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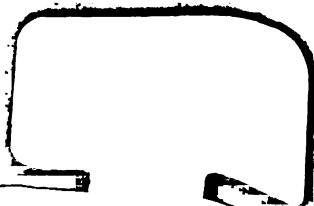
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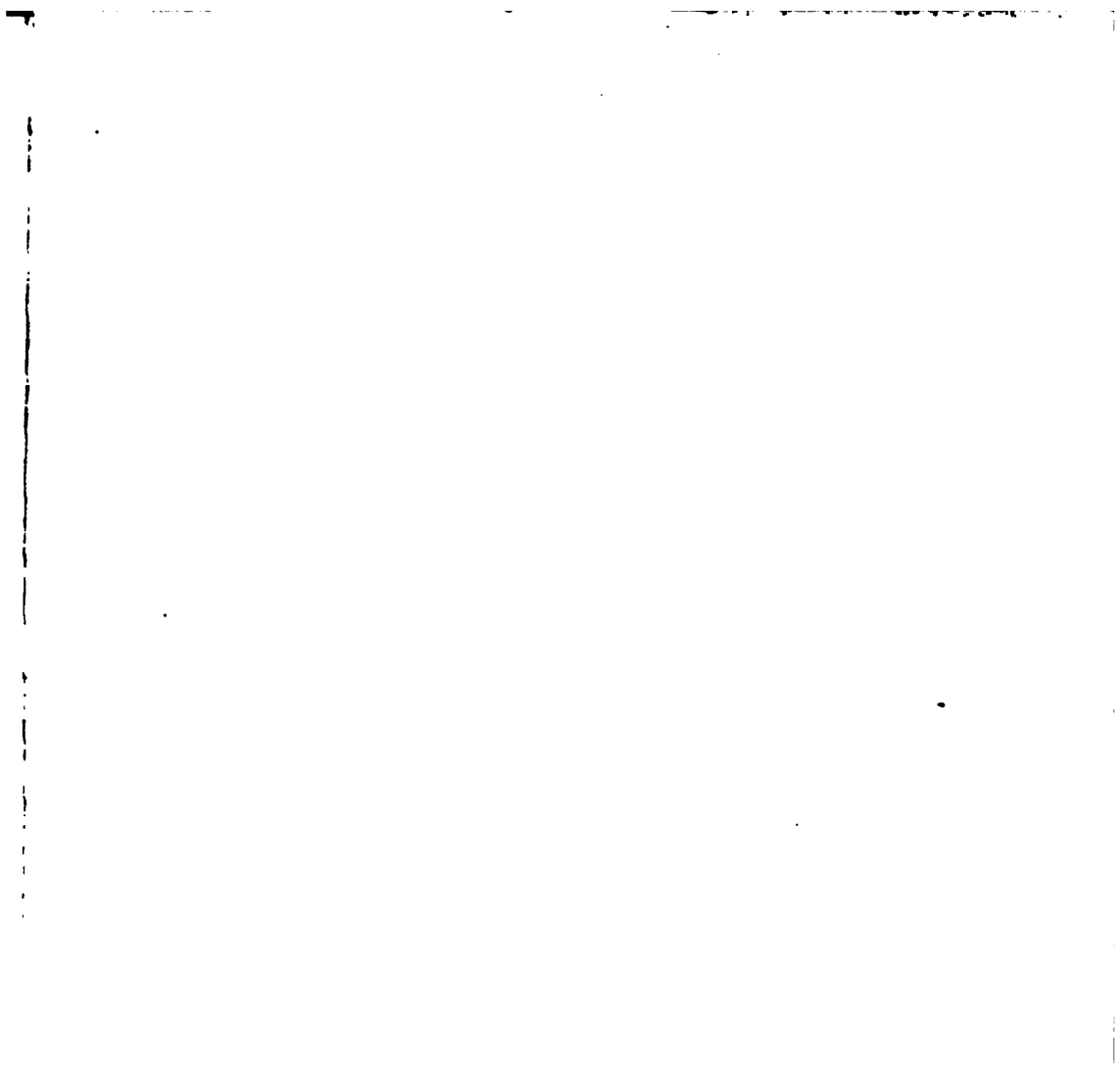
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4-1033

A SELECTION OF CASES  
ON  
PLEADING AT COMMON LAW.

WITH REFERENCES AND CITATIONS.

*Whittier*

By JAMES BARR AMES,  
ASSISTANT PROFESSOR OF LAW IN HARVARD UNIVERSITY.

PREPARED FOR USE AS A TEXT-BOOK IN HARVARD  
LAW SCHOOL.

"Cases arise by Chance, and are many Times intricate, confused, and obscured, and are cast into Form and made evident, clear, and easie by good and fair Pleading; so that this is the principal Art of Law, for Pleading is not Talking." — HOB. 296.

"Et saches mon fils, que est un des plus honorables laudables et profitables choses en nostre ley, de aver le science du bien pleader en actions reals et personels; et pur ceo, jeo toy counsaile especialement de metter ton courage et cure d' ceo apprender." — LITTT. Ten. Sect. 534.

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## Demurrer.

When could it be used?

Why referred to the Court? Court decides the law - jury the facts - but who applies law to the facts? Where case goes to issue generally the jury, on demurrer the Court.

The form of a demurrer.

See the forms given in Stephen 12-3, Chitty, 6th Ed. 1245 ff. & under new procedure in Eng Chitty, 7th Eng. II, 247 ff.; also Gould,

In substance the form was:

In the \_\_\_\_\_ (name of court)

The - day of \_\_\_\_\_ in the year of our

Lord (or King) \_\_\_\_\_.

A.B. } And the said defendant (or plain tiff) by  
C.D. } —, his attorney, says that the declaration (or other pleading) is not sufficient in law.

Could it be demurred to a demurrer. see

5 Mord. 181 - a long informal plea held a demurrer - and Salk. 219 where a dem. to a dem. was held a discontinuance. see Chitty, I, 698. Stephen 7.235 W. 274. Sl. 386

Plea had to join in demurrer. Form: 7

In Turpin Drft. virtually pleads that goods are his own. On demurrer held bad for it amounts to the general issue.

~~Heard dem. but before St. Elia. & as to the form is issued~~

see Stephen, 92. Chitty, 6th Ed. II, 1267; TH. II. 26.  
 4th ed. In substance same as dem. as to title  
 of count, date, name of action, Tody Treg; And  
 the plaintiff (or deft.) says that the declaration  
 (or other pleading) is sufficient in law.

## CASES ON PLEADING.

### CHAPTER I.

#### DEMURRERS.

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13. 1st.

17. 1st.

17. 2d.

18.

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#### SECTION I.

#### General Demurrers.

#### NOTE.

[Coke upon Littleton, 71 b.]

A DEMURRER cometh of the Latin word *demorari* to abide; and therefore he which demurreth in law, is said, he that abideth in law: *Moratur* or *demoratur in lege*. Whensoever the learned counsel of a party is of opinion that the count or plea of the adverse party is insufficient in law, then he demurreth or abideth in law, and referreth the same to the judgment of the court.

#### J. S. OF DALE v. J. S. OF VALE.

IN THE EXCHEQUER CHAMBER, HILARY TERM, 1474.

[Reported in Jenkin's Century Cases, 133.]

TRESPASS is brought by J. S. of Dale against J. S. of Vale, for certain goods taken. The defendant pleads that J. S. of Vale was possessed of those goods as of his own, until J. S. of Dale took them and gave them to the plaintiff. The plaintiff replies that J. S. of Dale and the plaintiff are the same person, and he demurs upon the plea. Judged for the plaintiff. For the defendant's joinder in demurrer confesses the replication; and a man cannot give to himself; and the plea is no more than that the goods for which the trespass was brought were the goods of the defendant, which is not a plea, for it amounts to not guilty; and where a plea pleaded amounts to a general issue, the general issue ought to be pleaded.

the first part must plead them in  
 accordance with the form of the  
 law. \* A plea must be framed in form  
 when trespass is brought & vice versa.

\* Common law compel, a party to  
 join the issue in law or fact.  
 it has to be made with the issue or demurrer

in case of ~~person~~ a jury ~~is~~ taken before the auditor to determine the amount.

*omit.*

TRESHAM v. FORD.

IN THE COMMON PLEAS, HILARY TERM, 1601.

[Reported in Croke's Elizabeth, 880.]

ACCOUNT, supposing him to be receiver of £120 of his money by the hands of Vavasor, *ad compotum reddendum*. The defendant pleaded *nunques son receiver*, &c., and the jury find that he was receiver of such a sum. The defendant, before the auditory, pleaded that he was possessed of divers obligations, wherein Francis Tresham, son and heir to the plaintiff, was obliged unto him in £400, and that the said Vavasor paid unto him this £120 in satisfaction of those bonds, and thereupon he delivered unto him the said bonds to the use of the plaintiff, which he accepted. And thereupon the plaintiff demurred. And it was held by the whole court to be no plea, for it is contrary to the verdict, which found him to be receiver, to render, &c.; and the plea amounts to no more but that he was not receiver to account.<sup>1</sup>

*A plea contrary to the  
ascertained facts is the  
case in voids*

*\* Exception to general rule of  
demurres admitting. A  
demurmer cannot admit  
anything contrary to the  
finding of the jury.*

*omit.*

COLE v. MAUNDER.

IN THE KING'S BENCH, HILARY TERM, 1635

[Reported in 2 Rolle's Abridgment, 548.]

If one enters my close, and with an iron sledge and bar breaks and displaces the stones on the land, being my chattels, and I request him to desist, and he refuses, and threatens me if I shall approach him; and upon this I, to prevent him from doing more damage to the stones, not daring to approach him, throw some stones at him *molliter et molli manu*, and they fall upon him *molliter*, still this is not a good justification, for the judges say that one cannot throw stones *molliter*, although it were confessed by a demurrer; and it would be perilous to give men liberty to throw stones in defence of their possession, for when a stone is thrown from the hand, it cannot be guided, and [here] a justification of a battery in defence of possession, although this arises from the possession, still [in] the conclusion is in defence of the person.

*Judgment for plaintiff.<sup>2</sup>*

*A demurmer stands  
where the plea by  
law admits the  
guilt.*

*A demurmer does not admit  
cannot admit a fact which  
the Court knows to be true.*

<sup>1</sup> Taylor v. Page, Cro. Car. 116; Holabird v. Burr, 17 Conn. 568; People v. Shaw, 18 Ill. 581, accord. — Ed.

<sup>2</sup> Weston v. Carter, 1 Sid. 9, accord. — Ed.

*In Law &c.*

In an action of account. At trial as to whether Deft. received money jury found that he was receiver. On trial before auditor as to account, Deft. pleaded that he received the money for certain bonds & in de-murrer held that plea contradicted fact formerly ascertained by Jury & hence void.

A plea to a writ for <sup>battery(?)</sup> trespass that the Plff. trespassed & to prevent him Deft. threw stones molliter is bad on demurrer for we cannot throw stones molliter & hence a demurrer cannot confess that & throwing stones is not proper to prevent further trespass.



Pltf, in indebitatus assumpsit, alleged that he ~~sold~~ Drft. a horse & Drft. pleaded denial age & Pltf. replied that he sold it to him to go on his necessary business & Drft. demurred & held that the demurred admitted that it was a necessity & J. for Pltf.

Pltf. brought action on an inland bill of exchange & relied on special custom of London that bearer might bring action. Drft. demurred. Held that the demurror, confessed custom that it was outside judicial notice & hence J. for Pltf.

## BARBER v. VINCENT.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1680.

[Reported in *Fresman*, 581.]

*Indebitatus assumpsit* for a horse sold for £20. The defendant pleaded *deins age*.

The plaintiff replied, that he sold him the horse for his convenience to carry him about his necessary affairs; to which the defendant demurred.

And the sole question was, whether an action would lie against an infant for money for a horse sold? It was urged on the defendant's part, that an infant was chargeable only for necessities, as meat, drink, clothes, lodging, and education.<sup>1</sup>

But the court were of a contrary opinion; for the plaintiff having averred that he sold him the horse to ride about upon his necessary occasions, and the defendant having confessed it by his demurrer, it must now be taken to be so. If the defendant had traversed, then the jury must have judged of it, whether it were necessary or convenient, or not; and so likewise of the price of the horse, whether it were excessive or not.

*Jud' pro quer' nisi.*<sup>2</sup>

Any thing confessed in a demurrer must be taken to be so.

## HODGES v. STEWARD.

IN THE KING'S BENCH, EASTER TERM, 1693.

[Reported in 3 *Salkeld*, 68.]

THIS case is reported in 1 Salk. 125; to which may be added, that this was an action on the case brought upon an inland bill of exchange, in which the plaintiff declared upon a special custom in London for the bearer to bring the action, &c.; and upon a demurrer to the declaration, besides the other points adjudged in this case, it was held, that the defendant having demurred, without traversing the custom, he had thereby confessed there was such a custom, though in truth there was not, and for that reason the plaintiff had judgment; for though the

<sup>1</sup> *Cro. Eliz.* 174; *Ayliff v. Archbold*, Latch, 169.

<sup>2</sup> *Tatem v. Perient*, Yelv. 195; *Speccot v. Sheres*, *Cro. El.* 828; *Gundry v. Feltham*, 1 T. R. 828; *Gas Co. v. Turner*, 6 B. N. C. 827; *Tyler v. Bland*, 9 M. & W. 841; *Tancred v. Allgood*, 4 H. & N. 444; *P. M. Gen. v. Ustick*, 4 Wash. C. C. 847; *City of Lowell v. Morse*, 1 Met. 475; *Troy & G. R.R. v. Newton*, 1 Gray, 640. accord. — Ed.

any thing confessed in a demurrer must be taken to be so.

234.

court takes notice of the law of merchants, as part of the law of England, yet they cannot take notice of the customs of particular places; and this custom, as set forth in the declaration, being sufficient to maintain the action, and the defendant confessing it by his demurrer, he hath given judgment against himself.

REX AND REGINA v. KNOLLYS.

TRINITY TERM, 1694.

[Reported in 1 Raymond, 10.]

AN indictment was found at Hick's Hall against the defendant by the name of Charles Knollys, Esq., for the murder of Captain Lawson (who had married the sister of the defendant), and this indictment was removed by *certiorari* into the King's Bench, where the defendant pleaded a misnomer in abatement.<sup>1</sup> The Attorney-General replies to this plea, that the defendant, upon the thirteenth of December, 4 Will. & Mar., preferred a petition to the house of peers then in parliament assembled, that he might be tried by his peers, and that after long considerations and debates the house of peers dismissed his petition, *secundum legem parlamenti*, and disallowed his peerage, and made an order that the defendant should be tried by the course of the common law, &c. To this replication the defendant demurred, and the Attorney-General joined in demurrer. And after divers arguments at the bar by Sir Edward Ward, attorney-general, Sir Thomas Trevor, solicitor-general, Sir William Williams, king's counsel for the king and queen, and by Serjeant Pemberton, Serjeant Levinz, and Sir Bartholomew Shower, for the defendant, this day, viz., the 20th of June, the Court of King's Bench in solemn arguments at the bench unanimously gave their opinions for the defendant.

As to the objection, that the judgment was said to be given *secundum legem parlamenti*, which the defendant by his demurrer hath confessed,

He (Lord Holt) answered, that a demurrer confesses only matter of fact, and that only when it is well pleaded, but it never confesses matter in law. *Indictment abated.*<sup>2</sup>

<sup>1</sup> Only so much of the case is given as relates to the effect of the demurrer. — Ed.

<sup>2</sup> "But the allegation now in question [that thereupon it became the duty of the defendant to do that which the plaintiff complains of his omitting to do] is open to the further objection, that, however directly averred, it is an averment of matter of law only, and not of matter of fact. If the words had been, that the defendant became bound by law to do certain acts, it could not be questioned that that was an

A mit ordering a review in the  
Superior Court hearing it.

Rule. →

Concerning a pleading in law - a plea  
should state facts & leave the question  
of law to the Court. 36 Alfred Rep.

In an indictment for murder the question turned on whether Dept. was a peer or not. Pltff. alleged that Dept had been considered by house of Lords & following law of parliament, found not to be a peer.

Def. demurred, & held that demurer did not confess that the trial was following law of parliament as that was matter of law not of fact.

Deft. pleaded misnomer in abatement  
stating that he was baptized Benja-  
min without that the same John was  
Ever called John. Drummer. Plea  
is repugnant baptized Benjamin  
but is John. Holt held that it  
invalidated plea in abatement  
while Powell contra.

in subsequent cases on immateriality  
the original statement is a plea.  
Holt is a general demurrer an objection  
will lie only to merits & not to form unless  
specially pleaded

SECT. I.]

WALDEN v. HOLMAN.

5

WALDEN v. HOLMAN.

IN THE QUEEN'S BENCH, HILARY TERM, 1704.

[Reported in 2 Lord Raymond, 1015.]

THE plaintiff declared against the defendant by the name of John, who pleaded in abatement that he was baptized by the name of Benjamin, *absque hoc, quod idem* Johannes, was ever known by the name of John; and the plaintiff demurred generally.

HOLT, C. J. Matters of form may be taken advantage of on a general demurrer, when the plea only goes in abatement, for the Statute of Elizabeth only means that matters of forms in pleas which go to the action shall be helped on a general demurrer. So here, the plea is ill in form, for it is *absque hoc, quod idem* Johannes, &c., which is a confession of his name to be so, and makes the subsequent matter repugnant; and by this traverse the defendant has waived the matter that went before, of his being baptized by the name of Benjamin, and has made the traverse the substance of his plea.

POWELL, J. This plea is good in substance, and then will an immaterial traverse hurt it?

HOLT, C. J. It is a good traverse, but informal, for the plaintiff may take issue on it; and in this case, since the defendant has not relied on the plea of baptism, the traverse is become material.

POWELL, J. I think the traverse is immaterial, for a man can have but one name of baptism; and the defendant has alleged that matter sufficiently, and it will not be hurt by the traverse.

allegation of matter of law; and the words, 'it became the duty of the defendant,' if they were to be understood as averring the existence of some duty different from that arising out of a legal obligation, certainly would not aid the declaration, inasmuch as the breach of such a duty does not give a cause of action. But, if they be understood, as we think they are, as averring the existence of a legal liability, it is well established that such an averment, being an averment of matter of law, will not supply the want of those allegations of matter of fact from which the court could infer the law to be as stated; so that such allegation is useless where the declaration is insufficient, and superfluous when sufficient without it. In the case of *Parnaby v. The Lancaster Canal Company*, 11 Ad. & E. 228, 8 P. & D. 162, the court rejected the statement, that it thereupon became the duty of the company to remove the obstruction, as being an inference of law improperly stated. And in the case of *Priestly v. Fowler*, 8 M. & W. 1, although the declaration contained a direct averment that it became the duty of the defendant to use due and proper care, the court arrested the judgment, because the declaration contained no premises from which the duty of the defendant, as therein alleged, could be inferred by law." *Brown v. Mallett*, 5 C. B. 616, per Maule, J.; *Partridge v. Strange*, Plowd. 86; *Burton's Case*, 5 Rep. 68; *Ford v. Peering*, 1 Ves. Jr. 77; *Seymour v. Maddox*, 16 Q. B. 828; *White v. Crisp*, 10 Ex. 812; *Metcalf v. Hetherington*, 11 Ex. 269; *Hayden v. Manufacturing Co.*, 29 Conn. 560; *McCune v. Gas Co.*, 80 Conn. 528; *Hewison v. New Haven*, 84 Conn. 139; *Buffalo v. Holloway*, 8 Seld. 498; accord. — Ed.

798.278.

To reply to 1st plea Plaintiff's Answer  
 2nd plea Defendant's Answer  
 3rd plea Plaintiff's Answer  
 or answer

HOLT, C. J. The matter of the baptism would have been a good plea of itself, for it implies a negative, that he might have concluded with it, and relied upon it, without saying that he was never called or known by any other name, for he can have no other Christian name. This plea is only dilatory, and not to the merits.

Let the defendant answer over, *per curiam*.<sup>1</sup> That is he (the plaintiff) must continue suit & defendant answer.

HATTON AND OTHERS, ASSIGNEES v. JEFFREYS.

IN THE KING'S BENCH, HILARY TERM, 1715.

[Reported in 10 Modern Reports, 280.]

THE court was moved for leave to plead a plea, and demur to the declaration, at the same time, upon the 4 Anne, c. 16, § 4; the words of which are, "that it shall be lawful for any defendant, or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence; provided, nevertheless, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs," &c.

Leave of court  
 is not always  
 given in matter

A plea and a demurrer cannot be joined.  
 L. R. Stone v. Smith.  
 Answer & declaration may be divided.

THE COURT. The words of the act of Parliament are, "That it shall be lawful to plead as many several matters," &c. Now a demurrer is so far from being a plea, that it is an excuse for not pleading. Here you plead, and at the same time pray that you may not plead. The word "matter" imports a possibility that the other party may demur to it; but there can be no demurrer upon a demurrer. This was never attempted before.<sup>2</sup>

*Suit.*

TOMKINS v. ASHBY.

AT NISI PRIUS, CORAM ABBOTT, C. J., JANUARY 19, 1827.

[Reported in Moody & Malkin, 82.]

ASSUMPSIT for money deposited by the plaintiff with the defendant.

The defence suggested was that the money was deposited for a particular purpose (the answering the differences on some Mexican bonds), and applied to that purpose.

<sup>1</sup> Nowlan v. Geddes, 1 East, 684; Lloyd v. Williams, 2 M. & Sel. 485, per Bayley, J.; Esdaile v. Lund, 12 M. & W. 618; Casey v. Cleveland, 7 Port. 444; Elmer v. McKenzie, 5 Ala. 617; Getchell v. Boyd, 44 Me. 482; Clifford v. Cony, 1 Mass. 495; Clarke v. Brown, 6 N. H. 84; Shaw v. Dutcher, 19 Wend. 222; Mantz v. Hendley, 2 Hen. & Munf. 308, accord. — Ed.

<sup>2</sup> Gayle v. Smith, Minor, 88, accord. Conf. Furniss v. Ellis, 2 Brock. 14. — Ed.

Statute did not extend to actions <sup>by the King</sup>  
heretofore, <sup>to suits</sup> ~~statutes~~ <sup>47 R. 701.</sup>  
Hould, 405. 1 Chit. 541.

Statute did not extend to replication  
& subsequent pleadings so they had  
to pick out one point in each plea  
only. Hould, 400. Pleas. R. 2.  
Com. Dig. Pleas. E. 2. Steph. Pl. 265

By 4 Anne, c. 16. Sec. 4. ~~two~~ pleas by  
leave of Court a person was al-  
lowed to plead several matters.

Drft. desired to demur & plead.  
Held that this was impossible.

A demur & plea to same thing  
not allowed. Did not extend

to dilatory pleas. - the Court allowing  
only one of them at a time & any point.  
Hould, 401, 1 Sell. Pr. 275. Steph. Pl. 266

In an action of assumpsit for money  
Drft. pleaded that it was received  
for purchase of certain bonds & offered  
in evidence a demur to a bill  
in Chancery & also pleading to  
the bill admitting the bonds. Held  
inadmissible. They are only plead-  
ings for the case to come before  
Court & do not admit absolutely.



Apparently at C.L. an admission by pleading was conclusive against the party in another suit. A protestation was used to avoid admitting facts for other suits, but it had no effect where issue was found against party pleading. By 4 Wm IV. protestation was done away with and admissions had only same effect as if it had been made. Greenleaf states C.L. rule relying on cases before p. 7. see 1 Greenl. sec. 27. Hayes quotes look it up. — On Examination of authorities could find no case holding that where protestation was not used the facts were admitted for another suit.

One Stebbins, deceased, gave Pltf a note due when he should become 21 years old. Stebbins died 3 yrs after & Pltf became of age 9 yrs after in 1827. Deft. pleaded Pltf's coming of age & that note had not presented in 12 mos. after action accrued as provided by law. Pltf. replied that it was presented March 1821 and before expiration of legal time for presenting. Deft. rejoined that it was not presented within a year after Pltf. came of age & demanded to act. This admitted the undeclined statement and Pltf.

*a demurrer in equity, having been overruled, is a plea in equity does not admit the facts demurred or pleaded*

*a demurrer admits the facts — and is a plea only for the adjudication of the court.*

SECT. I.]

PEASE v. PHELPS.

7

The defendant had filed a bill in chancery against the plaintiff, alleging, among other things, the circumstances now relied on with respect to the Mexican bonds. The plaintiff had originally demurred to this bill; but the demurrer being overruled, he put in an answer, pleading to that part of the bill which respected the Mexican bonds, and answering the remainder of the bill.

*Scarlett*, for the defendant, proposed to read the proceedings in chancery, as amounting to an admission on the part of the plaintiff of the circumstances respecting the Mexican bonds as stated in the defendant's bill.

ABBOTT, Ld. C. J., refused the evidence; observing that, after a demurrer to a bill in equity, if the demurrer were overruled, the party might still go on and answer; and that, consequently, the demurrer was not to be taken as an absolute admission of the facts charged; and that on the same principle a plea in equity could not be so, for that it amounted merely to a statement of circumstances to prove that, supposing the facts charged to be true, the defendant is not bound to answer; it could, therefore, no more amount to an admission of those facts, than a witness who declines to answer a question can be held to admit the fact inquired into.

*Verdict for the plaintiff.*

*omit.*

PEASE v. PHELPS.

SUPREME COURT OF ERRORS, CONNECTICUT, JUNE, 1834.

[*Reported in 10 Connecticut Reports, 62.*]

THIS was an action on a promissory note made by Samuel Stebbins, deceased, in these words: "Simsbury, January 7, 1818. I promise to pay John Wood Pease, when he shall arrive at the age of twenty-one years, the sum of one thousand dollars; value received. Samuel Stebbins."

The defendant pleaded in bar, that Samuel Stebbins died in January, 1821, leaving his last will and testament, whereby he appointed his wife, Ursula Stebbins, and Samuel S. Stebbins, executors thereof; that the plaintiff became twenty-one years of age on the 5th of December, 1827; and the plaintiff's right and claim accrued after the death of said Samuel Stebbins, viz., on the 5th of December, 1827, and was not exhibited to said executors, or either of them, by the plaintiff, within twelve months after the right of action accrued, and is the same for which the suit is brought.

The plaintiff replied, that on the 7 day of March, 1821, and before

<sup>1</sup> *Auld v. Hepburn*, 1 Cranch C. C. 122; s. r. 166; *Pearce v. Provost*, 4 Houst. 467, accord. Conf. *Alexander v. Sutlive*, 8 Ga. 27 — Ed.

~~1 Cranch 129. 4 Houst 376.~~

*See 1821. See orig. in file.*

<sup>8</sup>  
merely a conclusion of law.  
the expiration of the time limited for the exhibition of claims against said estate, the plaintiff caused said note to be exhibited to said Ursula, and the same then was exhibited to and demanded of said Ursula as executrix.

The defendant, in his rejoinder, averred that said claim was not exhibited to said executors, or either of them, by the plaintiff, within twelve months after the plaintiff arrived to the age of twenty-one years; and demurred to the residue of the replication. The plaintiff joined issue; and thus the pleadings terminated.<sup>1</sup>

The cause was tried on the issue in fact, at Hartford, September term, 1833, before Church, J.

The plaintiff claimed, and requested the court to instruct the jury, that upon the facts conceded on the pleadings, by the demurrer, they should find that the note was duly presented within one year after the plaintiff came of age, and should, therefore, return a verdict for the plaintiff. The court did not so instruct the jury; and the defendant obtained a verdict. The plaintiff thereupon moved for a new trial; and the case was reserved for the opinion of the Supreme Court of Errors upon the facts stated on the record, and on the matters embraced by the motion.

Hungerford and W. W. Ellsworth, for the plaintiff, contended that due presentment was admitted by the demurrer; and no further evidence was necessary.

Sherman and Toucey, for the defendant, contended that the demurrer is not evidence on the trial of the issue to the jury. It never was intended as an instrument of evidence. When it admits facts, it admits them for the sole purpose of presenting their sufficiency for determination.

CHURCH, J. But it was claimed by the plaintiff that, upon the facts conceded on the pleadings, by the demurrer, the court should have instructed the jury to find that the note in question was duly presented within twelve months, as averred in the replication. This claim of the plaintiff cannot be supported. A demurrer presents only an issue in law to the court for consideration: the jury have no concern with it; and although it is a rule of pleading that a demurrer admits facts well pleaded, for the sole purpose of determining their legal sufficiency, yet, as a rule of evidence, it was never supposed that a demurrer admitted any thing. *Tompkins v. Ashby.*

The other judges were of the same opinion except BISSELL, J., who was not present when the case was argued, and therefore gave no opinion.

*New trial to be granted.*<sup>2</sup>

<sup>1</sup> The statement of the case and the pleadings have been abbreviated. — Ed.

<sup>2</sup> *Gray v. Finch*, 28 Conn. 512; *Alexander v. Sutlive*, 8 Ga. 27 (*semble*); *Stinson v. Gardiner*, 38 Me. 94, *accord*. — Ed.

Take *Montgomery v. Richardson*,  
p. 58 here.

tried to introduce it as Evidence  
before the jury but held that  
anything admitted on <sup>ex</sup>demure  
is only admitted for the Court's  
consideration & new to be pre-  
sented in Evidence to the jury.

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~~Close ~~up~~~~

Actum quare clausum fregit.

Pltf. alleges possession & property in land & that Deft entered cut down trees & to damage 70\$.

Def. demurred & County Court sustained demurer. Pltf. appealed. Def. claimed he could not appeal case. Statute limited appealable cases to those over 70\$, or such as involved title to land. Held that this did not bring into question or determine title to land. Demurres admits all material arguments. <sup>title to the</sup> Land was in material & hence not in question or settled.

## SCOVILL v. SEELEY.

SUPREME COURT OF ERRORS, CONNECTICUT, JUNE, 1841.

[Reported in 14 Connecticut Reports, 238.]

THIS was an action of trespass *quare clausum fregit*. The declaration alleged, that on the 31st of January, 1838, the plaintiff owned and possessed a certain tract of land [describing it], and while he owned and possessed the same, at Stamford, on said 31st day of January, the defendant, with force and arms, unlawfully broke into and upon said tract, and then and there, with like force and arms, did cut down and destroy two hundred trees then and there standing and belonging to the plaintiff, of the value of fifty dollars, with other enormities; to the damage of the plaintiff the sum of seventy dollars. This action was originally brought to the County Court, and upon demurrer to the declaration, it was, by that court, adjudged to be insufficient; and the cause was thereupon appealed, by the plaintiff, to the Superior Court. At the term of the latter court, in September, 1840, the defendant moved that the action be remanded to the County Court, to be proceeded with according to law, upon the ground that it was not appealable. This motion was reserved for the advice of this court.

*Booth* and *Ferris*, in support of the motion, contended that this was an action to recover damages for cutting the plaintiff's trees; that the title of the land was not in question, nor determined; and consequently, that as the demand does not exceed seventy dollars, the cause was not appealable, and ought to be remanded to the County Court.

*Hawley*, contra, insisted that the action was appealable. It was brought to, and tried by, the County Court, and the title of land was drawn in question, being explicitly averred in the declaration, and admitted by the demurrer. *Dunton v. Mead*<sup>1</sup> disposes of the question raised here. If this action be not appealable, ejectment demanding no more than seventy dollars would not be.

CHURCH, J. The matter in demand, in this action, does not exceed seventy dollars; and, by the general provision of the statute concerning civil actions, section 61, is not appealable. To make it so, the title of the land must have been drawn in question and determined; and this can only appear to have been done, either by the pleadings in the case, or by the certificate of the County Court. There was no certificate in this case; nor can it be inferred from the record that the

<sup>1</sup> 6 Conn. 420.

title of the land was either drawn in question or determined. The demurrer to the declaration placed nothing in question but the legal sufficiency of the allegations contained in it; and the judgment rendered upon it determined nothing regarding the title of land.

The plaintiff, to be sure, alleged ownership, as well as possession. This is a very common form of declaring, in actions of trespass; and if the reasoning of the plaintiff be correct, title is drawn in question, in all cases, under such a form of declaration, let the defence be as it may. The demurrer admitted the truth of all the material averments, so that no matter of fact was drawn in question, none was in dispute, and none was determined by the judgment.

If the title to the land was in question in this case, in the County Court, it has been, as between these parties, conclusively settled, and can no more be disturbed in a future action, under any other form of pleading, — a proposition to which the plaintiff, we presume, would not willingly assent.

Nothing was decided, by this court, in the case of *Dunton v. Mead*,<sup>1</sup> which conflicts with the opinion here expressed.

We think this cause was not appealable, and advise that it be remanded to the County Court.

In this opinion the other judges concurred.

*Cause not appealable, and remanded.*<sup>2</sup>

### MILLARD v. CYRUS BALDWIN.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1855.

[Reported in 3 Gray, 484.]

ACTION of contract, commenced at June term, 1854, of the Court of Common Pleas. The declaration alleged that the defendant and Cyrus Hewitt, by agreement in writing, submitted certain matters in dispute between them, relating to the late copartnership between Hewitt and Charles A. Baldwin, to the arbitration of Ralph Taylor, William Stoddard, and Orrin Curtis, their decision in the premises to be final and binding upon the parties; that the defendant bound himself to Hewitt to assume, so far as Charles A. Baldwin was concerned, all

<sup>1</sup> 6 Conn. 413.

<sup>2</sup> *Havens v. R.R. Co.*, 28 Conn. 69; *Lamphear v. Buckingham*, 33 Conn. 237; *Daniels v. Saybrook*, 84 Conn. 377; *Randel v. Ches. & Del. Can. Co.*, 1 Harringt. 233; *Brooke v. Widdicombe*, 39 Md. 386; *State v. Peck*, 60 Me. 498 (semble), accord; *Hyde v. Moffat*, 16 Vt. 271 contra. — Ed

31 v 468

When a demurrer is sustained there can be no issue on matter of fact.

?

omit.

Also allegation of owner - still has in material then

←

Pltf. alleged a certain arbitration agreed to & effected between one Hunt & Deft & states that the arbitrators adjudged that Deft. pay him 125\$ in ac of estate of Charles A. Baldwin deceased, And that Deft. is indebted to Pltf. 125\$ as awarded by the arbitrators. Held in demurrer that this is not an allegation of indebtedness but a conclusion of law drawn from previous statements & hence T. for Deft.



When a demon is sustained

the debts and liabilities of said partnership; that there was then due from said partnership to the plaintiff a debt of one hundred and twenty-five dollars, which was submitted to said arbitrators, and which the defendant "was, in and by said award, ordered to pay to the plaintiff, and is by law bound to pay the same. [And the plaintiff says, the defendant owes him one hundred and twenty-five dollars, the sum so awarded to him by said arbitrators."<sup>1</sup>]

The defendant demurred, on the ground that the declaration did not state a legal cause of action substantially in accordance with the rules contained in statute 1852, c. 312; and particularly assigned the following cause of demurrer: "That said plaintiff is not a party to any agreement or award between the defendant and said Hewitt, and the plaintiff cannot sue on any agreement or award set forth in said declaration, or in the copy to said declaration annexed."

*I. Sumner*, for the defendant.

*J. Branning*, for the plaintiff.

The allegation in the last clause in the declaration, that the defendant owes the plaintiff one hundred and twenty-five dollars, the sum so awarded by said arbitrators (the truth of which, as of all other facts distinctly stated, is admitted by the demurrer), is of itself a sufficient declaration, under the new practice act (statute 1852, c. 312), and all that precedes may be rejected as surplusage.

METCALF, J. This demurrer must be sustained.

The last clause in the declaration cannot aid the plaintiff; for it is not an allegation of fact, and as such admitted by the demurrer, but a mere statement of the plaintiff's conclusion of law resulting from the facts already alleged. Gould Pl. c. 9, § 29.

*Declaration adjudged bad.<sup>2</sup>*

<sup>1</sup> See *supra*, p. 4, note 1. — Ed.

<sup>2</sup> "A demurrer admits the truth of such facts as are issuable and well pleaded; but it does not admit the conclusions which counsel may choose to draw therefrom, although they may be stated in the complaint. It is to the soundness of those conclusions, whether stated in the complaint or not, that a demurrer is directed, and to which it applies the proper test." *Branham v. Mayer, &c.* 24 Cal. 602; *Moss v. Riddle*, 5 Cranch, 851; *Wadsworth v. Champion*, 1 Root, 895; *State v. Sykes*, 28 Conn. 228; *Carter v. Anderson*, 4 Ga. 519; *Harkins v. Edwards*, 1 Iowa, 480; *Games v. Robb*, 8 Iowa, 199; *Stuckaleger v. Smith*, 27 Iowa, 286; *Griggs v. St. Paul*, 9 Minn. 246; *Cal. Tel. Co. v. Patterson*, 1 Nev. 157; *Van Doren v. Tjader*, 1 Nev. 392; *Boyce v. Brown*, 7 Barb. 85; *Hall v. Bartlett*, 9 Barb. 301; *Lienan v. Lincoln*, 2 Duer, 672; *Lawrence v. Wright*, 2 Duer, 674; *Schenck v. Naylor*, 2 Duer, 678; *Catlin v. Glover*, 4 Tex. 152; *Holman v. Criswell*, 18 Tex. 44; *State v. Collins*, 5 Wis. 347, *accord*. — Ed.

Pleadings are to bring the case to a point.

Point.

Holds does not admit facts or law which counsel for plff is argument set up.

15 Am. 385.

A demurrer does not admit, nor can the court take into consideration in determining the rule of law, anything not pleaded in the original plea.

Sealed 'Gaston' mints, letters of Prob. in a few state Bills & Notes, in Stephen on Pleading. -

STORY v. DOBSON.

SUPREME COURT, TENNESSEE, DECEMBER 10, 1873.

[Reported in 2 Heiskell, 29.]

*E. Cooper, Coldwell, and Warder*, for plaintiff in error.  
*James L. Scudder*, for defendants.

FREEMAN, J., delivered the opinion of the court.

This was action commenced by plaintiff against defendants, in the Circuit Court of Bedford County, on a promissory note, with a declaration in usual form, for the sum of one thousand dollars.

The defendants demurred to the declaration, craving *oyer* of the note in the declaration mentioned, and then stating causes of demurrer. The note, however, is not set out upon *oyer*, or made part of the record by bill of exceptions. We cannot notice it, therefore. The profer of the note does not make it part of the record; and the defendant, by his demurrer, has totally failed to make it part of the record; so that we cannot see that the objections to the note made in his demurrer are well taken.<sup>1</sup>

The case will be reversed, and remanded to the Circuit Court for further proceedings.<sup>2</sup>

<sup>1</sup> See *supra*, p. 4, note 1. — Ed.

<sup>2</sup> *Hobson v. MacArthur*, 8 McL. 248; *Steamboat v. McCraw*, 81 Ala. 659; *Tuolumne Water Co. v. Chapman*, 8 Cal. 892; *Cook v. De la Guerra*, 24 Cal. 237; *Brennan v. Ford*, 46 Cal. 7; *Ins. Co. v. Lanier*, 5 Fla. 110; *Hooker v. Gallagher*, 6 Fla. 351; *Norfolk v. People*, 43 Ill. 9; *Hust v. Conn*, 12 Ind. 257; *Jones v. Bradford*, 25 Ind. 805; *Polk Co. v. Hierb*, 37 Iowa, 361; *Wells v. Jackson Co.*, 44 N. H. 61; *Amory v. McGregor*, 12 Johns. 289; *Yewell v. Bradshaw*, 2 Duv. 574; *Harris v. Thomas*, 1 Hen. & Munf. 18; *Fowler v. Colton*, 1 Pinn. 331, *accord.* — Ed.

570.448

Profer is not binding on the deed in evidence in the plaintiff's declaration.  
If profer not included a demurrer rests.  
If profer is made in declaration *oyer* so as to be demanded in plea & then the deed becomes part of the declaration.

A demurrer admits nothing except  
it be in the record of the pleadings.

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At common law general demurrers  
must to matters of form as well as to  
substance except perhaps the case of  
duplicity which may have always  
required a special demurrer. Gould,  
430 note 1; 3 Salk. 122; Comb. 297; Bac.  
Abr. Pleas. 1st. N. 6; 11 East 565; 2 Root 146;  
1 Root 387; 6 Mass. 336; 3 Tan. & M'H. 355;  
1 Blackf. 291; Chitty, 16th, \*694.

Pltf. brings replevin.

Defl. sets up title in ac of a rent  
granted to one Millington & from  
him descended to another Mil-  
lington, "as Cousin their", & so on  
to Defl. Demurrer.

Held that "as Cousin their" suf-  
ficiently states the substance  
of the statement introduced in  
Defl. answer & though bad  
in form is good in substance to  
withstand general demurrer.

An error in form must be specially demurred to & does not fall under a general demurrer.

## SECTION II.

*Special Demurrers.*

[27 Eliz. Cap. V. § 1.]

FORASMUCH as excessive charges and expenses, and great delay and hinderance of justice, hath grown in actions and suits between the subjects of this realm, by reason that upon some small mistaking or want of form in pleading, judgments are often reversed by writs of error, and oftentimes upon demurrers in law given otherwise than the matter in law and very right of the cause doth require, whereby the parties are constrained either utterly to lose their right, or else, after long time and great trouble and expenses, to renew again their suits: for remedy whereof, be it enacted by the Queen's most excellent majesty, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That from henceforth, after demurrer joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right and cause of the matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express together with his demurrer; and that no judgment to be given shall be reversed by any writ of error, for any such imperfection, defect, or want of form as is aforesaid, except such only as is before excepted.

## HEARD v. BASKERVILE.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1614.

[Reported in Hobart, 232.]

WILLIAM HEARD brought a replevin against Richard Baskerville; the defendant, as bailiff to John Dinham, Esq., *cognovit captionem*, for he saith, that long before, &c., one Thorne was seised of the place, &c., in fee, and, 12 E. II., granted a rent of two shillings, with a clause of distress, unto one Millington: and that he died seised, after whose death the rent descended unto another Millington, as his cousin and heir, without showing how his cousin; and then shows, that the latter Millington, 21 H. VIII., did grant unto one Dinham, and his heirs, the said rent in exchange, which was executed on both sides; and

chain of title from Thorne to Dinham. The cousin's age not definite chain & might have been demurred to as too long.

then conveys the rent down by descent unto Dinham, in whose right, &c.; upon which consusans the plaintiff demurred generally.

And the only question whereupon the court stood was, whether the not setting down of the manner of cousinage were matter of substance, or only of form, such as by the Statute of Demurrers, 27 Eliz. c. 5, ought to be particularly set down, or else no advantage to be taken of it.

This case, as being of great consequence in the rule, was argued by the judges publicly, and adjudged for the defendant, Warburton only dissenting.

In this case all the parts of the statute were considered: the title is for the furtherance of justice; that is, justice final and definitive, which ends the controversy by deciding it, according to the very right. For every several action or suit hath a kind of justice which may be called interlocutory, in which a man may fail, though his right be good, as for want of form before this statute, which bred much charge and multiplicity of suits, and was also a hinderance of that definitive justice, which this statute intends to further.

Now the moderation of this statute is such, that it doth not utterly reject form; for that were a dishonor to the law, and to make it in effect no art;<sup>1</sup> but requires only that it be discovered, and not used as a secret snare to entrap. And that discovery must not be confused and obscure, but special; therefore it is not sufficient to say, that the demurrer is for form, but he must express what is the point, and specialty of form, that he requires. And so is the word and meaning of the statute.

Now, then, the main question is, what is matter and what is form, within the meaning of the law? The statute best expresseth itself in this, for it divideth itself into two main members, which are *membra dividenda*.

First, Want or imperfection of form.

Second, The matter in law or very right, *scil.* the true, mere, or very right; to which must be added that which the statute adds, that this right, according to which judgment is to be given, must appear to the court within the body of the record.

*Inf.* So now, whatsoever it is without which the right doth sufficiently appear to the court, it is form within this law; and so, *e converso*,

<sup>1</sup> "This is a slip in form; but it is always the best way to make the party pay for this kind of slip, if advantage is taken of it by special demurrer. Infinite mischief has been produced by the facility of the courts in overlooking these errors; it encourages carelessness, and places ignorance too much upon a footing with knowledge among those who practise the drawing of pleadings." Morgan v. Sargent, 1 B & P. 59, per Eyre, C. J. — Ed.







whatsoever is wanting or imperfect, by reason whereof the right appears not, is not remedied as form within this law.

And therefore if an executor or administrator bring an action of debt, and do not produce his probate or administration, it is not holpen.

So if a man plead a conveyance of a rent, or the like, that cannot pass without deed; without producing the deed in plea, it is not holpen; for it is not enough for the party to say that he is executor, or that rent was granted to him; but the court must see and adjudge of it, or else the right appears not, and the adverse party may cause the deed to be enrolled, which makes it a part of the plea, whereupon the court shall judge whether it maintain the plea or not.

So if the means be wanting whereby the right should be made to appear, it is incurable; as if a man bring an action of debt upon an obligation, and produce it, but say it may be made beyond sea, or in no place, a general demurrer serves. And for the same reason two affirmatives without a traverse is not holpen, because it admits no trial, without which the court cannot see the right.

If a man bring an action upon an obligation to perform an award, the defendant pleads no award made, the plaintiff replies and shows the award; now here is a full issue, a negative and an affirmative. Yet if the plaintiff doth not also assign the breach, the defendant may demur generally, yet that breach was not traversable, but the plea as between the parties hath an issue before. And this is but an excrescence or surplusage. But yet because it doth appear to the court that he had right or cause of action without it, it is matter, and not form, to set it forth for information of the court. And this is a case of some singularity upon this statute.

But now to the case in question, the descent to Millington, as cousin and heir, is the substance and body of the plea. And the rest which is required under, viz., is but a specification and explication of the same thing by manner how it is, which is not the point issuable, but the general descent as it is ruled in the case of challenge for cousinage. 14 Eliz. Dyer, 319; 9 E. IV. 3; 19 H. VIII. 7. And note that this is matter of fact to be tried by jury, whether it were pleaded generally or specially. So it is not like the cases of not showing deeds, or the like, whereof we speak before, whereupon the court is to judge.

Note Wimbish and Talbois' Case.<sup>1</sup> Wimbish and his wife plead, that she was the person to whom the interest of the land did belong, after Elizabeth Talbois; and the opinion of the court was equal, whether that were well or not; yet that was at the common

<sup>1</sup> Flo. 88.

*O. T. in p. 1. ... require to be assigned in plea. When the deed was made. Continues as to the Statute.*

*Held matter of substance. Ct. Aum made it matter of form.*

*only ground for op. dem. Chitty 260 note 2. and 13 Wall. 303. Time*

*Rigd. No cause of action unless award made. If award made, not effect of statute.*

law before this statute, but indeed the plea followed the words of the statute, 11 H. VII., which were in the general; whereupon they replied, that maintained the plea, and that was less certain than this, for she might be next either by descent or purchase, or by reversion or *rem.*

Now where it was objected by Warburton, that if the pedigree had been set down, the plaintiff might have pleaded a release of any of those ancestors, or pleaded bastardy in any of them, it was answered, that the traverse of the descent of the rent to Millington must have been the issue in both cases, and would have served, and so will, though the pedigree be not set down.

one of the members of the court.

Note, that as a demurrer at the common law did confess all matters formally pleaded, so now, by the statute, a general demurrer doth confess all matters pleaded, though unformally, according to the forms meant by this law; for such forms are now not material, not being expressed in the demurrer.<sup>1</sup>

Point.

*omit.*

KING v. ROTHAM.

IN THE COMMON PLEAS, TRINITY TERM, 1672.

[Reported in Freeman, 88.]

THE plaintiff declares, that the defendant distrained his horse, &c., and he replevied, and the defendant distrained his cattle again in the same place *eâdem occasione*.

The defendant says he did distrain his cattle *alid occasione, absque hoc*, that he did take again in the same place *eâdem occasione quâ prius*. The plaintiff demurs, because the plea of the defendant is *multiplex, repugnans, etc.*

*Wilmot pro quer.* 1. This amounts but to the general issue; for the general issue is *quod non cepit averia prout prædictus querens versus eum queritur*. It was answered *per Cur.*, that he could not take advantage of that but upon a special demurrer, and this was general.<sup>2</sup>

VAUGHAN, C. J., said, In actions that are very rare, the court will allow of a special plea that amounts but to a general issue; for it is not contrary to law that a man should plead the special matter, for he may as well plead it as give it in evidence; but it is a thing that the judges in discretion will not allow of, to avoid prolixity of pleading; and is

<sup>1</sup> See Zouch v. Bamfield, 1 And. 168; s. c. 1 Leon. 80; Slade v. Drake, Hob. 801; Bassal's Case, Say. 87.—Ed

<sup>2</sup> See *supra*, p. 5, note 1.—Ed.

*Law French.*

*Not followed to any great extent.*

Es/ a lence

Prof. declares that Drft distrained his horse  
the replied & that Drft. distrained his  
his cattle in same place for same  
reason. Drft. pleads that he is  
distrained for another reason but that  
that he distrained for same reason.  
Drummer.

Held that you cannot take advan.  
page if bad form in Civil Drummer.

Sometimes special pleas amounting  
to Civil Issue good.

---

~~Not much followed.~~



but matter of form, and therefore no advantage shall be taken of it upon a general demurrer. The defendant paid 40s. costs, and had liberty to mend his plea.<sup>1</sup>

*duplicitly is the stating of  
no facts in answer to  
one former plea. The  
stating of two facts is  
often necessary to con-  
stitute a  
case & then  
plea is al-  
lowable.  
Repeat in  
form.*

## ANONYMOUS.

NOTE PER HOLT, C. J., 1708.

[Reported in 8 Salkeld, 122.]

PER HOLT, C. J. There were special demurrers at common law, but they were never necessary but in cases of duplicitly, and therefore they were seldom practised; for as the law was then taken to be upon a special demurrer, the party could take advantage of no other defect in the pleading, but to that which was specially assigned for cause of his demurring.

But upon a general demurrer he might take advantage of all manner of defects, that of duplicitly only excepted; and there was no inconvenience in such practice, for the pleadings being at bar *viva voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general demurrer as upon a special one; therefore, after the Reformation, when the practice of pleading at bar altered, the use of general demurrers still continued, and thereby this public inconvenience followed, that the parties went on to argue a general demurrer, not knowing what they were to argue, and this was the occasion of making the statute 27 Eliz., by which it is enacted, that the causes of demurrer should be known in all cases, and this was restorative of the common law.

[4 Ann. Cap. XVI. § 1.]

For the amendment of the law in several particulars, and for the easier, speedier, and better advancement of justice, be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the first day of Trinity term, which shall be in the year of our

<sup>1</sup> Saunders v. Crawley, 1 Roll. R. 112; Bolton v. Bishop, 2 H. Bl. 259; Childress v. Emory, 8 Wheat. 671; Christmas v. Russell, 5 Wall. 290; Martin v. Iron Works, 85 Ga. 320; Tucker v. Randall, 2 Mass. 233; Dole v. Weeks, 4 Mass. 451; Snyder v. Croy, 2 Johns. 428; Davison v. Mull, 1 Hay. (N. Car.) 384; Comm. v. R.R., 58 Pa. 62, accord. — ED.

*leads to several issues.  
There must be only one  
issue. Before the thing is  
a tenor.  
Reason for n  
allowing  
city*

Lord one thousand seven hundred and six, where any demurrer shall be joined, and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment, according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, notwithstanding that such imperfection, omission, or defect might have heretofore been taken to be matter of substance, and not aided by the statute made in the twenty-seventh year of Queen Elizabeth, intituled, "An Act for the furtherance of justice in case of demurrer and pleadings," so as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause; and therefore from and after the said first day of Trinity term, no advantage or exception shall be taken of or for an immaterial traverse; or of or for the default of entering pledges upon any bill or declaration; or of or for the default of alleging the bringing into court any bond, bill, indenture, or other deed whatsoever mentioned in the declaration or other pleading; or of or for the default of alleging of the bringing into court letters testamentary, or letters of administration; or of or for the omission of *Vi et Armis et contra pacem*, or either of them; or of or for the want of averment of *Hoc paratus est verificare*, or *Hoc paratus est verificare per Recordum*; or of or for not alleging *prout patet per Recordum*, but the court shall give judgment according to the very right of the cause, as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shown for cause of demurrer.<sup>1</sup>

[15 & 16 Vict. Cap. LXXVI. §§ 50-52.]

either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form.

No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer.

If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit.

<sup>1</sup> See *Powdick v. Lyon*, 11 East, 565. — Ed.

alled -  
Demurrer  
Law  
Procedure  
Act.

In material France — in abeyance her ~~France~~  
no doubt.

Default of entering pledges.

Default of inspect.

Mission of vi et armis or contra faciem.

mission of verification?

This practically ends special  
demerits in Eng.



Ptfs. in an action to recover on a  
bond against Deft set forth  
in replication sufficient facts  
to state a good cause of action.  
Defts demurred specially.

Ct. overruled demures and  
the statute not having been  
complied with for pleading  
over T. was entered against  
them. They appeal on ground  
that final T. cannot be en-  
tered on Special demurrer. Held  
that a special demurrer in-  
cludes a general one & that  
on it T. is final at Common  
law. The statute gave Defts.  
a right to plead over in cer-  
tain time but which they  
have not done.

T. for Ptf.

## STATE OF MAINE v. PECK AND OTHERS.

SUPREME JUDICIAL COURT, MAINE, 1872.

[Reported in 60 Maine Reports, 498.]

ON exceptions. Debt on the official bond of Benjamin D. Peck, treasurer of the State of Maine, dated Jan. 28, 1858. Writ dated March 23, 1861.

At the April term, 1868, the defendants pleaded full performance of the covenants and condition of the bond. To which the plaintiff replied, that the principal defendant was treasurer of the State from Jan. 13, 1858, to Feb. 4, 1859, and that on Jan. 14, 1858, and divers other days and times between that day and Feb. 4, 1859, the said Peck, as said treasurer, received divers sums, amounting to \$39,231.19, belonging to the State of Maine, and hath not accounted for any part of it. To this replication the defendants filed a special demurrer, which was joined.

(The pleadings may be found 58 Maine, 123.)

May 30, 1871, the certificate of the decision of the law court was received by the clerk overruling the demurrer and adjudging the replication good. On the 13th day of the succeeding October term, 1871, the defendants moved for leave to withdraw the demurrer without the consent of the plaintiff and plead to the issue, tendering there-with a rejoinder alleging, substantially, that Peck did account for and pay to the plaintiff the said sums of money by the replication alleged not to have been paid, and tendered an issue to the country. But the presiding judge overruled the motion and declined to receive the rejoinder, and ordered judgment to be entered for the plaintiff for \$150,000, the penalty of the bond.<sup>1</sup>

*T. B. Reed*, attorney-general, for the State.

*J. & E. M. Rand*, for the defendants.

The defendants had a right to rejoin.

Not proper to enter a final judgment for the plaintiff, upon overruling a special demurrer to a replication.

A special demurrer does not admit the truth of all facts well pleaded, as is the case with general demurrer.

Even general demurrer does not admit damages,—an averment that defendant owes plaintiff a stated sum as damages. *Millard v. Baldwin*.

Nothing in R. S. c. 82, § 19, deprives defendants of right to rejoin;

<sup>1</sup> See *supra*, p. 5, note 1. — Ed.

but only declares that a demurrer once filed shall be ruled upon, unless withdrawn by consent before ruling.

DANFORTH, J. This case has once been before the law court upon a special demurrer to the plaintiff's replication. 58 Maine, 123.

The demurrer was overruled, the replication held good, and the case sent back for final judgment, unless the defendants were permitted to withdraw their demurrer and plead anew under the provisions of the R. S. c. 82, § 19. At the term subsequent to the announcement of the decision, the defendants' counsel moved for leave to withdraw said demurrer, without the consent of the plaintiff and without complying with the provisions of the statute, and to plead to the issue. This motion was denied and judgment ordered for the plaintiff. To this the defendants except, and now claim the allowance of the motion as of right. If the judgment upon the issue, as made up, should have been *respondeat ouster*, the defendants are right in their claim, otherwise not.

Previous to the several acts embodied in the revision above cited, on a general demurrer, final judgment would have been ordered by the law court, and entered as of the preceding, instead of at the following term. The demurrer was not to a plea in abatement, but to a replication, which presented the full merits of the case. The party had his option to plead or demur. By electing the latter, "he shall be taken to admit that he has no ground for denial or traverse."<sup>1</sup>

The result of this principle is the well-established rule, "that a demurrer admits all such matters of fact as are sufficiently pleaded." It must be conceded that the replication contains all the facts necessary to maintain the plaintiff's case, and the court have decided that it is sufficient in form. Hence a final judgment must necessarily follow. The authorities are to the same effect. Stephen, in his work on pleading, treating of judgments for the plaintiff, says, on pages 104, 105: "If it be an issue in law, arising on a dilatory plea, the judgment is only, that the defendant answer over. . . . Upon all other issues in law, and in general all issues of fact, the judgment is, that the plaintiff recover." Also in note on page 144: "On demurrer to any pleadings which go to the action, the judgment for either party is the same as it would have been on an issue of fact, joined upon the same pleadings and found in favor of the same party." *Clearwater v. Meredith*;<sup>2</sup> *McKeen v. Parker*;<sup>3</sup> *McAllister v. Clark*;<sup>4</sup> and in *Parlin v. Macomber*,<sup>5</sup> *Washington v. Eames*,<sup>6</sup> final judgment was ordered by the law court. But without denying the correctness of these principles when applied to a general demurrer, it is contended that they are not applicable to

<sup>1</sup> Stephen on Pl. 143.

<sup>2</sup> 1 Wallace, 25, 43.

<sup>3</sup> 51 Maine, 389.

<sup>4</sup> 83 Conn. 258.

<sup>5</sup> 5 Maine, 413.

<sup>6</sup> 6 Allen 417.



1

a special one, and it is said that none of the authorities so lay down the law. While this may be true, it is also true that in *Parlin v. Macomber*, above cited, the court applied the law to a special demurrer, and also in *Washington v. Eames*, though in Massachusetts, under their practice act, all demurrers must be special. No authority has been cited, or fallen under notice, in which any distinction between the two kinds of demurrer, in respect to the judgment has been alluded to, which, to say the least, is a little singular, if any such difference exists.

Nor are we able to perceive any such distinction from the principles involved.

Every special demurrer includes a general one, for under the former "the party may, on the argument, not only take advantage of the faults which his demurrer specifies, but, also, of all such objections in substance, as regarding the very right of the cause, as the law does not require to be particularly set down."<sup>1</sup> In the one just as much as in the other the party has his option to plead or demur, and must be equally bound by his election. But one answer, unless by leave of court, can be made to the plea, and if that is overruled, it must stand as true. A special demurrer raises a question of law just as much as a general one, and there is no exception to the rule as laid down, that where there is an issue of law upon a plea "which goes to the action" the judgment will be final.

To these principles of law the statute adds its mandate. R. S. c. 82, § 19. The statute gives the parties some rights which did not previously exist, and, for the purpose of enabling them to secure those rights, the action is to stand upon the docket until the term following the certificate of decision. But these rights must be asserted within the time and in the manner specified, otherwise they are waived, and the case ended. No distinction is made between a special and general demurrer, but the word used comprehends both. In this case the new pleadings were not filed on the second day of the term, nor do the costs appear to have been paid. Hence, in accordance with the statute, judgment must be entered.

APPLETON, C. J.; CUTTING, WALTON, and DICKERSON, JJ., concurred. TAPLEY did not concur.<sup>2</sup>

<sup>1</sup> Stephen on Pl. 141, 142; Bouvier's Law Dict., "Demurrer."

<sup>2</sup> *Martin v. Iron Works*, 85 Ga. 820; *Brown v. Jones*, 10 G. & J. 384, accord. See to same effect, *Boyce v. Whitaker*, Doug. 94; *Darling v. Garney*, 2 Dowl. 101; *Andrus v. Waring*, 20 Johns. 158; *Stoney v. McNeille*, 1 McC. 85. — Ed.

*the facts set forth & give the case to the judge for final judgment. The most jurisdictional statutory provision allows a demurrer to be entered. No to be withdrawn.*

*Here is general one to do to me that of will draw*

## SECTION III.

*Effect of Demurrer in opening the Record.*

## RIGEWAY'S CASE.

IN THE QUEEN'S BENCH, EASTER TERM, 1594.

[Reported in 3 Reports, 52 a; s. c. Poph. 41.]

*omit.*

*Action*

In debt by William Grila, against Thomas Rigeway, late sheriff of Devon, for £309 6s. 8d., which he had recovered in the same court in trespass for taking his goods, against John Chawner, *alias* Chaundeler, and that the body of Chawner was taken in execution 20 April, 33 Eliz., by the defendant, then sheriff, at Stoke Cannon in the said county; and afterwards the defendant, 10 December, 34 Eliz., then sheriff of the same county, suffered him to escape in *Parochia S. Mariæ de Arcubus in warda de Cheape, London, et ad largum quo voluit ire permisit, etc.* The defendant pleaded and confessed that Chawner was taken in execution the said 20th of April, 33 Eliz., and so continued in his custody till the eighth day of December following; at which day, at Stoke Cannon aforesaid, he broke the prison, *et a custodia ipsius Th. Rigeway contra voluntatem ipsius Th. evasit, super quo præd' Thomas adtunc et ibidem recenter insecutus est præd' Johannem, et in recenti insecutione ipsius Johannis in forma præd', præd' Thomas Rigeway 11 Die Decembris tunc pro tempore sequent' apud Stoke Cannon præd' ratione et virtute executionis præd' et prioris captionis et executionis prædict', cepit et arrestavit præd' Johannem, etc.* The plaintiff, by way of replication, by protestation that the defendant did not make fresh suit, for plea said, *quod post evasionem præd' et antequam præd' Johannes Chawner recaptus fuit, idem Johannes per totum unum diem et noctem, viz. apud London in parochia et warda præd' fuit extra visum ipsius Thomæ, etc.* And thereupon the defendant did demur in law.<sup>1</sup>

It was resolved that the bar was insufficient, for the plaintiff hath declared of an escape in London, and the defendant justifieth the retaking of him at Stoke Cannon, and so the escape at London is not answered; but forasmuch as the plaintiff not denying the fresh suit,

<sup>1</sup> See *supra*, p. 5, note 1. — Ed.

*He must answer him on 15th day  
He may lieth for debt unless  
retaken in fresh suit.*

*Bar is a counter plea going to the  
right or fact of the action.*

Read case.

The plea did not answer dis-  
claration & therefore would  
have been bad in demurrer  
the place being material but  
the Pky. in replication tacitly  
acknowledges that it is the  
same place & this cures the  
plea. The replication is bad  
being immaterial & hence

J. for Dept.



Read care.

Drummer to insufficient bar  
threw open declaration. Since  
Longfield might be less than  
21 & yet the administration  
void (from time he was recruited)  
the declaration was void.

---

*A defect in substance is cured by an expression,  
admission of right in plea. see Som 1-266 see,*

*The whole record is not taken open 7 december.*

but by protestation hath only relied upon that matter, that the prisoner was out of his sight, the court will not intend other matter to maintain his action than he himself hath showed; and now on the whole record it doth not appear to the court that the plaintiff hath cause of action, wherefore the plaintiff perceiving the opinion of the court, did discontinue his suit; but it was agreed that if the plaintiff had demurred upon the bar, he should have had judgment.<sup>1</sup>

PIGGOT'S CASE.

IN THE COMMON PLEAS, HILARY TERM, 1598.

[Reported in 5 Reports, 29 a.]

*That is Piggot was acting for A. Longfield until he could act for himself.*

*judicially stated that bar was insufficient.*

*The demurrer not only dis-posed of the insufficiency of the bar but threw the case back on its merits.*

PIGGOT, administrator of Longfield, *durante minore etate* of A. Longfield, brought an action of debt in the Common Pleas on a bond against Gascoigne and Furthee; and averred that A. Longfield was within the age of twenty-one years; to which the defendants pleaded an insufficient bar; on which the plaintiff demurred. And forasmuch as the bar was insufficient, now the question was whether the declaration was good or not. And the doubt was, when administration is granted *durante minore etate*, how long it should endure, *scil.*, to the age of twenty-one years, or to what age it should continue. And thereupon the court conferred with sundry doctors of the civil law openly in court. And it was held by them that administration *durante minore etate* should cease at the age of seventeen years; and if such administration be committed, the executor being of the age of seventeen years is void: and for this cause it was adjudged by the court that the declaration was insufficient; for perhaps the executor was of the age of seventeen or eighteen, &c., and within the age of twenty-one years, as the plaintiff hath averred; and yet the plaintiff's administration was determined; for which cause it was awarded that the plaintiff should take nothing by his bill.<sup>2</sup>

<sup>1</sup> Burgess' Case, Hob. 14; Johnson v. Norway, Winch, 37 (*semble*); Hamond v. Dod, Cro. Car. 5 (*semble*); Cutler v. Southern, 1 Lev. 195 (*semble*); Perkins v. Perkins, Hob. 128; Zouch v. Bamfort, Godb. 188; Yingling v. Hoppe, 9 Gill, 813; U. S. v. Arthur, 8 Cranch, 257; Keay v. Goodwin, 16 Mass. 1 (*semble*); Andrus v. Waring, 20 Johns. 153, *accord*; Bamfield v. Bamfield, 1 Sid. 386 (*semble*), *contra*. — Ed.

<sup>2</sup> Foster v. Jackson, Hob. 56; Duppa v. Mayo, 1 Saund. 285 (5); Sykes v. Lewis, 17 Ala. 261; Burke v. Stilwell, 28 Ark. 294; McKeon v. Lane, 1 Hall, 819; Ward v. Sackrider, 8 Cal. R. 262 (*semble*); U. S. v. White, 2 Hill, 59 (*semble*), *accord*. — Ed.

## HASTROP v. HASTINGS.

IN THE KING'S BENCH, EASTER TERM, 1692.

[Reported in 1 Salkeld, 212.]

IN an action upon the case for beer and wages, the defendant pleaded in abatement, *et pet. judicium de billa, et quod billa prædict. cassetur*; for uncertainty in the declaration upon demurrer, the defendant's counsel insisted upon many faults in the declaration. *Et per Cur.* The defendant shall not take advantage of mistakes in the declaration upon a plea in abatement; but if he would do that, he must demur to the declaration, per quod a respondeas ouster was awarded.<sup>1</sup>

*upon going back to the declaration in account of demurr.*

## ANONYMOUS.

IN THE COMMON PLEAS, HILARY TERM, 1763.

[Reported in 2 Wilson, 150.]

DEBT on a bond with condition for the payment of a certain sum of money on a certain day; defendant pleads payment before the day; plaintiff replies that the defendant did not pay before the day, et de hoc ponit se super patriam; defendant demurs, and plaintiff joins in demurrer.

Nares, Serjt., for the defendant, admitted that the plea at first was bad, but insisted the plaintiff had made it good by replying and tendering issue upon it, or that, if the issue was immaterial, there ought to be a replader.

Hewitt, Serjt., *contra*. This is a case where defendant has not joined issue to the country, but has put himself upon the judgment of the court; and though the replication be bad, yet whenever the case is upon a demurrer, the court looks for the first fault, which is in the plea here; and therefore judgment ought to be for the plaintiff; and of that opinion was the court, and gave judgment for the plaintiff.<sup>2</sup>

<sup>1</sup> Peter v. Pilkington, Carth. 171; Chambers v. Garnt, 1 Show. 91; Bonham's Case, 8 Rep. 120; Belayse v. Hester, 8 Lutw. 506; Bullythorp v. Turner, Willes, 472; Rogers v. Smiley, 2 Port. 249; Crawford v. Slade, 9 Ala. 887; Knott v. Clements, 18 Ark. 835; Ryan v. May, 14 Ill. 491; Price v. R.R., 18 Ind. 187; Dean v. Boyd, 9 Dana, 171; Clifford v. Coney, 1 Mass. 500; Shaw v. Dutcher, 19 Wend. 219, *accord*; Powys v. Williams, 8 Lutw. 514; Evans v. Stevens, 4 T. R. 224, *contra*. — Ed.

<sup>2</sup> Tresham's Case, 9 Rep. 110 b; Bonham's Case, 8 Rep. 120 b; Turnor's Case, 8 Rep. 138 b; Palmer v. Stone, 2 Wils. 96; Alexander v. Porter, Litt. 841; Marshall v. Freake, Palm. 287; Nicholson v. Simpson, 1 Stra. 297; Woodward v. Robinson, 1 Stra. 302; Lockwood v. Nash, 18 C. B. 536; Spencer v. Southwick, 11 Johns. 573; Mercin v. Smith, 2 Hill, 210; Frost v. Hammett, 11 Pick. 75 *accord*. — Ed.

*The plea was bad & therefore the declaration stands determined the case.*

*omit.*

A demurrer to a plea in abatement does not open the record.

### Read case.

Plea was bad as also replication but declaration good. On demurrer to replication the declaration alone stood hence D. for Pltf.

How if replication shows that Pltf. has no cause of action. (Def't on Trd. Insufficient Tr. Replication alleging an insufficient Trach. Dem.) Held, 442-3 says Pltf. must fail. See notes Held 443.

Assumpsit against three.

Two of Defts. pleaded a debt <sup>of record</sup> in  
set off.

Pltfs replied nul tuit record &  
gave a day for production of  
it.

Deft. demurred.

Held that since Pltfs' have  
made a discontinuance by  
not pleading or asking for  
J. against the 3rd Deft. the  
Pltfs cannot obtain any J.  
against Defts.

one plr was bad & removed  
the declaration ~~from~~ <sup>from</sup> the docket.

## TIPPET AND OTHERS v. MAY AND TWO OTHERS.

IN THE COMMON PLEAS, APRIL 30, 1799.

[Reported in 1 Bosanquet &amp; Puller, 411.]

DECLARATION in assumpsit against three. Two of the defendants pleaded a debt of record by way of set-off, without taking any notice of the third. The plaintiffs replied nil tiel record, and gave a day to produce the record to the two defendants who pleaded, but entered no suggestion on the roll respecting the third.

To this there was a general demurrer and joinder.

*Marshall*, Serjt., in support of the demurrer. The ground of this demurrer is, that as two of the three defendants have pleaded, and the plaintiffs have given them a day to produce the record, without suggesting any thing with respect to the third, the action is discontinued as to him, and that a discontinuance as to one defendant is a discontinuance as to all. It is a settled rule of law that a suit must be continued from its commencement to its conclusion without any chasm; and that any chasm is a discontinuance. In *Gilb. Hist. C. P.* 155, 158, it is said that if a defendant pleads to part, and says nothing to the other part, and the plaintiff replies to such plea without taking judgment for the part not answered to, it is a discontinuance, because he does not follow his entire demand in the court. So if he demur generally, for he ought to have prayed judgment upon *nil dicit* for that part. 1 *Rol. Abr.* fo. 487, 488. And this rule applies not only to the subject-matter of the cause, but also to the parties. 1 *Rol. Abr.* fo. 488; *Com. Dig. Pleader* (W. 3). Thus in *Bro. Abr. Discontinuance de Process*, pl. 22. Replevin against three, avowry by one, and so to issue, and the two others said they came in aid of the avowant, yet if the two have not a day given and continuance on the roll from day to day, all is discontinued; and, pl. 8, replevin against three of a taking in S., one appeared and avowed for himself in B., and traversed the taking in S., and made avowry to have a return which passed for the plaintiff, and he prayed judgment, and it was determined that as no proceeding was against the other two, all was discontinued, for the proceeding shall be made to continue against those who make default, otherwise it is a discontinuance. *Green v. Charnock* and *Another*<sup>1</sup> is to the same effect. The rule holds also where a plaintiff makes default. *Paston v. Lusher*.<sup>2</sup> If it be contended on the other side that a plea of set-off by two defendants in an action against three is bad, still the plaintiffs will not be entitled to judgment on this record, for by the discontinuance the cause is out of court.

<sup>1</sup> *Cro. Eliz.* 762.

<sup>2</sup> *Yelv.* 155.

*Shepherd*, Serjt., *contra*. Though the question immediately in issue on this demurrer be, whether the replication which the plaintiffs have put in be sufficient in law to answer the defendants' plea, still if we can show that the plea itself is bad, they cannot have judgment. Indeed, if we were to amend our replication, the defendants would be under the same difficulty. No authority has been adduced to show that discontinuance is the subject of demurrer.

EYRE, C. J. There is no rule in pleading more certain than that if a party can trace back the vices in the pleadings to the first fault, he has a right to take advantage of it on demurrer. But he cannot ask the judgment of the court unless he appear on the record to be capable of demanding judgment. Now in this case the plaintiffs, having replied to a plea by two of the defendants without taking notice of the third against whom they declared, have made a discontinuance; the cause, therefore, being discontinued, judgment must be given against the plaintiffs, for they are not in a situation to take advantage of the badness of the defendant's plea.

ROOKE, J. The plaintiffs, not being in court, cannot call upon the court to give them judgment.

*Per Curiam.* Leave given to amend on payment of costs.<sup>1</sup>

### MARSH, EXECUTOR OF QUINLAN, v. BULTEEL.

IN THE KING'S BENCH, HILARY TERM, 1822.

[Reported in 5 Barnewall & Alderson, 507.]

COVENANT upon a deed, whereby the parties agreed to submit certain differences to the award of arbitrators. The first<sup>2</sup> count of the declaration stated the defendant's covenant to obey, abide by, and perform the award, and that he would not by affected delay, or otherwise, hinder or prevent the arbitrators from making their award. It then stated that the arbitrators duly made their award, and that they thereby directed that the defendant should pay to the plaintiff certain sums therein mentioned. The breaches assigned were, that the defendant did not pay those sums of money. The defendant pleaded to the first count, that before the arbitrators made their award, he, the defendant, by deed, revoked their authority, of which deed and revocation of their authority the arbitrators, before the making of the award in the first count mentioned, had notice. To this plea the plaintiff demurred.

<sup>1</sup> Cf. *Lockwood v. Nash*, 18 C. B. 548. — ED.

<sup>2</sup> Only so much of the case is given as relates to this count. — ED.

Ptly declared in a Covenant to abide by arbitrator's award concerning certain differences & not to hinder award. Alleging award made & breach non performance of award by Defl. Plea that Defl. lacked authority of arbitrator hence award was void.

Hold that on demurrer to plea the Ptly must fail for the plea is a good answer to breach alleged in declaration & on other breach shown in the Plea Ptly. cannot now because he has not alleged it





*Chitty*, for the plaintiff. The plaintiff is entitled to judgment on the demurrer to the plea to the first count. The ground of action stated in that count is the breach of the covenant to perform the award. The plea shows the award to be void, but admits that the defendant has committed a breach of another covenant set out in the declaration, by which the parties covenanted not to prevent the arbitrators from making their award. In *Charnley v. Winstanley*,<sup>1</sup> this court refused to arrest the judgment in an action brought upon an arbitration deed, where one of the parties to the submission had become a *feme covert* subsequently to the submission and before the award: the breach alleged in the declaration being non-payment of money pursuant to the award, on the ground that it appeared upon the whole record that one of the parties had been guilty of a breach of the covenant not to abide by the award. *Le Bret v. Papillon*.<sup>2</sup> Now, here it appears by the defendant's plea that he has broken that covenant by revoking the arbitrators' authority, and therefore that case is expressly in point.

*Gaselee*, contra. The plea is a good answer to the cause of action alleged in the first count, which is substantially the non-payment of the money awarded. The plea shows that the award is wholly void. If the argument on the part of the plaintiff is to prevail, he will derive the same advantage from this action as if the award had been good. At any rate, that would be the case if the plaintiff had declared in debt upon the award, for in that case he would have been entitled to recover the whole sum awarded. (The court then desired him to proceed to the other point.)

ABBOTT, C. J. I am of opinion that the defendant is entitled to judgment upon the demurrer to the plea to the first count of the declaration. The ground of complaint in that count is the non-payment of money pursuant to the award, or, in other words, a breach of the covenant to perform the award when made. It appears by the plea that the defendant, by countermanding the authority of the arbitrators, has broken the covenant to abide by the award, or that whereby he stipulated not to hinder the arbitrators from making an award; and it is urged on the part of the plaintiff that although this plea is an answer to the cause of action suggested in this count, yet that, inasmuch as it appears upon the whole record that the defendant has been guilty of a breach of covenant, the plaintiff is entitled to judgment upon that count, and the case of *Charnley v. Winstanley*<sup>3</sup> has been relied upon. That case, however, is very distinguishable from the present. There it appeared upon the face of the plaintiff's count that the award was made after one of the parties to the submission had become a *feme covert*.

<sup>1</sup> 5 East, 286. ✓<sup>2</sup> 4 East, 502. ✓<sup>3</sup> 5 East, 286. ✓

Her marriage was in itself a revocation of the authority of the arbitrators, and therefore was a breach of the covenant to abide by the award. In this case, the breach of that covenant is disclosed only by the defendant's plea, and it never has been held that a plaintiff who seeks to recover damages for one ground of action stated in his count is entitled to recover in respect of another disclosed by the defendant's plea. I am of opinion that a plaintiff can recover only in respect of the ground of action stated in his declaration.

BAYLEY, J. For the reasons given by my Lord Chief Justice, I am also of opinion that the defendant is entitled to judgment on the demurrer to the plea to the first count.

HOLROYD, J. I am of opinion that the defendant is entitled to judgment upon the demurrer to the first plea. This case is very distinguishable from *Charnley v. Winstanley*, for the reasons already given by my Lord Chief Justice; and I think that the plaintiff, who, by his declaration, seeks to recover damages for the causes of action therein stated, ought not to be allowed to recover in respect of another cause of action, disclosed by the defendant's plea.<sup>1</sup>

*Judgment for the defendant upon the demurrer to the plea to the first count.*<sup>2</sup>

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DAVIES v. PENTON.

IN THE KING'S BENCH, FEBRUARY 6, 1827.

[Reported in 6 *Barnewall & Cresswell*, 216.]

DECLARATION stated articles of agreement of the 23d December, 1823, made between plaintiff and defendant, which recited that defendant for many years then past carried on the practice and profession of a surgeon, apothecary, and accoucheur, and had established a considerable connection in such business; and that, having determined to withdraw from the same, he had agreed with the plaintiff for the sale to him of all his then stock, and of the good-will of his said business; and also to demise to him his house in Great Surrey Street, in which the business was then carried on, upon the terms following, that is to say, the sum of £800 to be paid for the good-will of the business of a surgeon, apothecary, and accoucheur, and the influence and recommendation thereinafter agreed to be given by defendant

<sup>1</sup> Best, J., was absent at chambers.

<sup>2</sup> *Butt's Case*, 7 Rep. 24 b, 25 a; *Head v. Baldrey*, 6 A. & E. 459, 468, *accord*. See *Ins Co. v. Stanton*, 57 Ill. 359. — Ed.

The declaration was that Deft. sold his apothecary & business to Pltf. & promised not to practice for ~~years~~ at all in the future within 5 miles the same business. Breach that he did practice.

Plea: That Pltf. failed to pay certain notes consideration & condition of contract & thus forfeited bond of 500 £ for non performance.

Decumens to bond forfeiture.

Replication of bankruptcy to notes.

Held that in decumens the question of bankruptcy did not enter for it was on a separate part of record.



unto and in favor of plaintiff, and the lease of the house in Great Surrey Street, for the term of nineteen years and one-quarter, subject to the yearly rent of £80; and the stock in trade to be taken and purchased by plaintiff at a fair valuation; and that in part pursuance of the agreement defendant had accordingly demised to plaintiff the said messuage or tenement, with all and singular the appurtenances, for the term of nineteen years and one-quarter of a year, wanting two days, from the 25th of December, 1823, at the yearly rent of £80. The articles of agreement then stated that defendant, in further pursuance of the said agreement, and for and in consideration of £400 to the defendant in hand paid by the plaintiff at or before the signing of the articles of agreement, and for and in consideration of the further sum of £400 (being the remainder of the said sum of £800 consideration money thereinbefore mentioned), secured to be paid to defendant by a bill of exchange, bearing even date with the agreement, drawn by defendant upon and accepted by plaintiff for the said sum of £400, and payable twelve months after date; and of the further sum of £170 4s. (being the ascertained value of the stock in trade, goods, fixtures, and effects used in and about the said business or profession, as agreed upon between plaintiff and defendant), also secured to be paid to defendant by a certain other bill of exchange, bearing even date with the said agreement, drawn by defendant upon and accepted by plaintiff for the said sum of £170 4s., and payable at two months after the date thereof, agreed to and with plaintiff in manner following; that is to say, that he, defendant, should permit plaintiff to have, use, and exercise the said business, practice, and profession of a surgeon, apothecary, and accoucheur, from 24th December, 1823, and to carry on the same in and upon the same house and premises, and in the same way and manner as defendant had been used and accustomed to do; and to have, receive, and take the whole of the profits and produce of such practice and profession, to and for his own use and benefit; and that defendant should use his best endeavors and influence with all his patients and friends, to prevail upon them to employ plaintiff in the way of his said practice and business. And plaintiff did thereby agree to and with defendant that he, plaintiff, would well and truly pay and discharge the said two several bills so drawn upon and accepted by him, plaintiff, for the sums of £400 and £170 4s. as aforesaid unto defendant, as and when the said bills of exchange respectively became due and payable; and the defendant did by the said articles of agreement, lastly, promise and agree to and with plaintiff, that he, defendant, should not, nor would at any time thereafter, use, exercise, and carry on the art, business, or profession of a surgeon, apothecary, or accoucheur, within the distance of five miles from the

said message, being No. 12 in Great Surrey Street aforesaid, for his own private benefit or emolument, in any manner howsoever; and for the true performance of all and singular the agreements aforesaid, each of them, defendant and plaintiff, did thereby bind and oblige himself unto the other of them, in the penal sum of £500, to be recoverable for breach of the said agreement, in any court or courts of law, as and by way of liquidated damages. The declaration then stated mutual promises. Breach, that the defendant did use, exercise, and carry on the business or profession of a surgeon, apothecary, and accoucheur, within the distance of five miles from the said message. Plea, that plaintiff did not well and truly pay and discharge the said two several bills of exchange, according to the form and effect of the articles of agreement in that behalf, but wholly neglected and refused so to do, and therein failed and made default; and thereupon and according to the tenor and effect, true intent, and meaning of the articles of agreement, the plaintiff forfeited and became liable to pay to defendant the said sum of £500 in the articles of agreement mentioned, as and by way of liquidated damages. The plea then alleged further, that the plaintiff at the commencement of the suit was indebted to the defendant in the further sum of £500 for work and labor, &c. Replication (except as to so much of the plea as related to the penal sum of £500 first mentioned), that plaintiff before and on the 23d December, 1823, was a trader, &c.; and that in October, 1824, he became bankrupt, and on the 27th May, 1825, obtained his certificate. Demurrer to so much of the plea as related to the sum of £500 first mentioned.

*The Solicitor-General* in support of the demurrer.<sup>1</sup>

*Chitty*, contra. But it appears that the plaintiff has no right to sue; for the replication shows that after the agreement he became bankrupt, and consequently the right of action vested in his assignees. [BAYLEY, J. The plea of set-off goes to the whole declaration, the replication of the plaintiff's bankruptcy only to part of the plea. The demurrer is to the residue; and upon this demurrer the defendant cannot avail himself of the replication.]

ABBOTT, C. J. Then as to the other point, it is said that the plaintiff upon certain parts of the record has set forth his bankruptcy, and that as it appears upon the whole record that his assignees are entitled to the benefit of the contract stated in the declaration, the plaintiff cannot have judgment upon this demurrer. But in considering what judgment we are to pronounce upon this demurrer, we are bound to look only to that part of the record upon which the demurrer arises, and not at the other collateral parts of the record not connected with

<sup>1</sup> Only so much of the case is given as relates to the effect of the demurrer. — Ed

Commit  
did we not  
Plea  
penalty 500 £  
Bankruptcy.  
Deceit.



Whenever a demurrer is made  
on any part of the record the  
whole line of that part of re-  
cord is thrown open & back  
to & including declaration &  
party making first bad plead-  
ing has judgment.

it; and, looking to that part of the record upon which the demurrer arises, we are of opinion that the plaintiff is entitled to the judgment of the court.

BAYLEY, J. As to the other point, in arguing the question whether the defendant or the plaintiff is entitled to judgment upon this demurrer, neither of them has a right to have recourse to any parts of the record not connected with that upon which the demurrer arises. If the defendant had intended to rely on the bankruptcy as a bar to the plaintiff's right to recover, he should have pleaded it; and the plaintiff in that case might have replied that the assignees had repudiated the contract.

HOLROYD, J. I entirely agree with my brother Bayley that the defendant cannot claim in aid the other parts of the record, to show that the plaintiff is not entitled to judgment upon the demurrer.

LITTLEDALE, J. Then it is said that the plaintiff has no right of action, because it appears upon the record that he had become bankrupt. As to one sum, the plaintiff says, "that he has obtained his certificate." Then he demurs to the other parts of the plea. But supposing any thing turned on the question of bankruptcy, we should be bound to decide on the plea and demurrer following one another. We must treat the count, plea, and replication, and the count, plea, and demurrer, as distinct records, and give judgment upon each without reference to the other.

*Judgment for the plaintiff.*<sup>1</sup>

## THE AUBURN AND OWASCO CANAL CO. v. LEITCH.

SUPREME COURT, NEW YORK, JANUARY, 1847.

[Reported in 4 Denio, 65.]

DEMURRER to a replication. The declaration was in assumpsit for the recovery of certain instalments due upon shares of the capital stock of the plaintiff's corporation, subscribed for by the defendant. Pleas, 1. Non-assumpsit. 2. *Nul tiel corporation*. Replication to the second plea, setting out the act incorporating the plaintiff, together with certain acts amending and continuing that act. The

<sup>1</sup> Dodge v. McKay, 4 Ala. 346; Moore v. Leseur, 18 Ala. 606; Clarke v. Holt, 16 Ark. 257; Tommey v. Ellis, 41 Ga. 260; Ryan v. May, 14 Ill. 49; Hunter v. Bilyen, 39 Ill. 367; Weems v. Millard, 2 H. & G. 148; Bell v. Lamprey, 52 N. H. 49; Nelson v. Swan, 18 Johns. 483; Bryan v. Knight, 1 Tex. 180, accord. Conf. M'Dougal v. Robertson, 4 Bing. 441; Burroughs v. Hodson, 9 A. & E. 499, n.; Reg. Gen. Q. B., C. P. & Exch. H. T., 16 Vict. r. 17, 1 E. & B. App. v.; Bush v. Madeira, 14 B. Mon 212 — Ed.

the judgment upon a demurrer only so much of the plea or replication as demurs can be considered as the demurrer refers to.

defendant demurred to the replication, and the plaintiff joined in demurrer.

*W. H. Seward*, for the defendant.

*B. D. Noxon*, for the plaintiff.

By the Court, BRONSON, C. J. The defendant insists that the declaration is bad on general demurrer. [The Chief Justice then examined the pleadings, and came to the conclusion that the declaration was substantially defective; and then proceeded as follows:] But it is said, that as the defendant pleaded non-assumpsit as well as *nul tiel corporation*, he cannot upon this demurrer go back and attack the declaration; and several cases have been cited to sustain that position. But it will be found on examination that the point has never been directly and necessarily adjudged. The doctrine was first started in Wheeler v. Curtis,<sup>1</sup> and was there supposed to result from the well-established rule that the defendant cannot both plead and demur to the same count. It was said that the defendant should not be allowed to do indirectly what he would have no right to do directly. But the question whether the declaration was good or bad was not decided. The cause went off upon other grounds; and the point in question was not necessarily settled. In *Dearborn v. Kent*,<sup>2</sup> the *dictum* in the first case was repeated; but it was expressly held that the declaration was sufficient; so that it was wholly unnecessary to inquire whether the defendant was at liberty to make the question or not. *Russell v. Rogers*<sup>3</sup> is the next case; and there it was not decided whether the declaration was good or bad. It was apparently good; so that the point in question did not necessarily arise. In *Miller v. Maxwell*,<sup>4</sup> this doctrine was mentioned for the last time; and the same learned judge who first started it went a great way towards knocking it on the head. In that case the defendant pleaded the general issue, and two special pleas. The plaintiff demurred to the special pleas, and they were adjudged bad; but the defendant was allowed to go back and attack the declaration; and judgment was given against the plaintiff for the insufficiency of that pleading. Now, although the learned judge who delivered the opinion of the court took a distinction between a defect in the declaration which would not be cured by a verdict, and one which could only be reached by a demurrer, the principle of that case is directly opposed to the *dicta* which had preceded it.

It is quite clear that the defendant cannot both plead and demur to the same count. And it is equally clear that, at the common law, he could not have two pleas to the same count. Indeed, the two things, though stated in different words, are only parts of one common-law

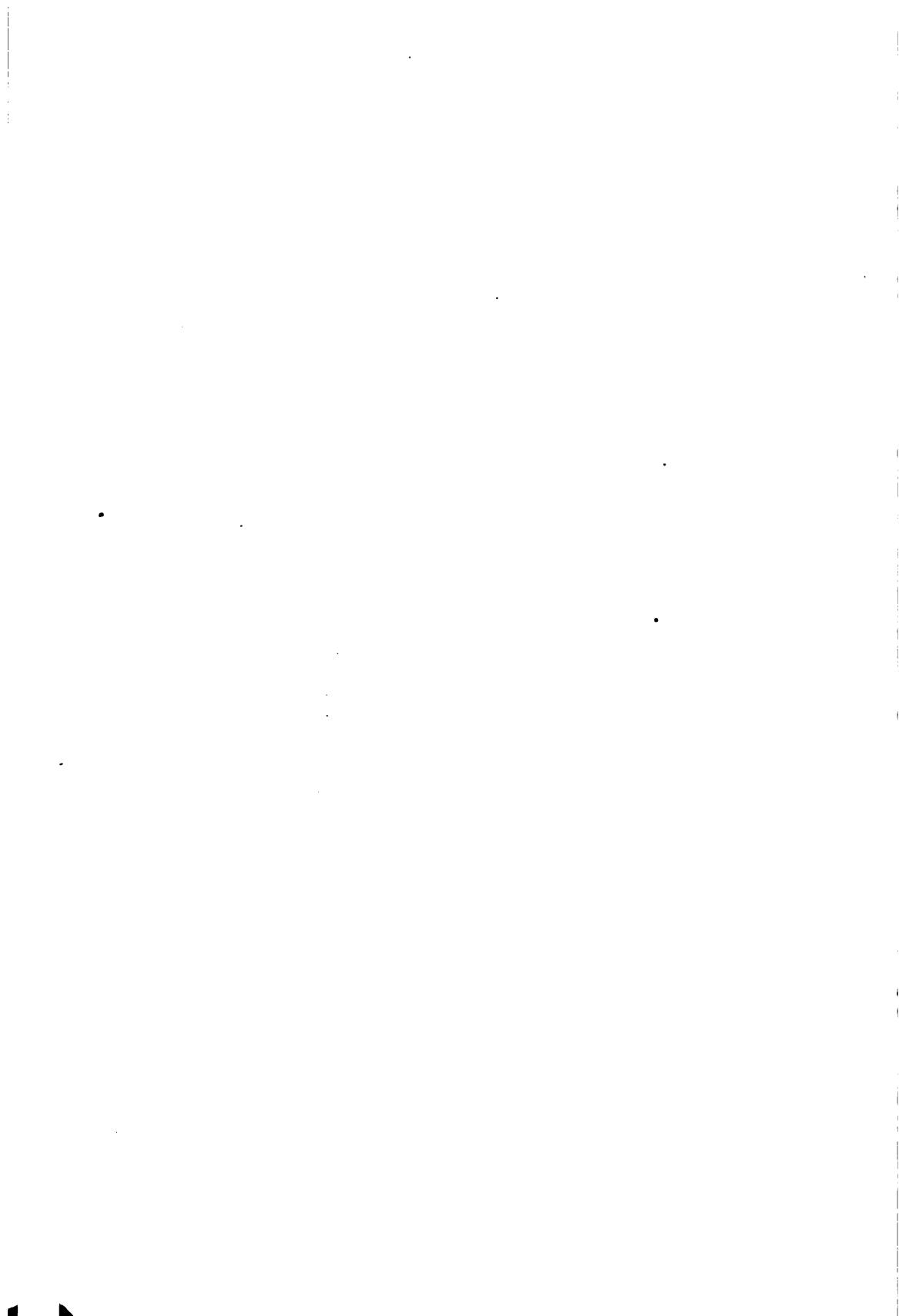
<sup>1</sup> 11 Wend. 658.

<sup>2</sup> 14 Wend. 183.

<sup>3</sup> 15 Wend. 351.

<sup>4</sup> 16 Wend. 9.





rule; to wit, that the defendant cannot make two answers to the same pleading. The statute of 4 & 5 Anne, c. 16, was made to remedy this inconvenience; and it allowed the defendant, with the leave of the court, to plead as many several matters as he should think necessary for his defence. With us, leave of the court is no longer necessary. 2 R. S. 352, § 9. The statute does not say that the defendant may both plead and demur; and consequently he cannot make two such answers. But he may plead two or more pleas; some of which may terminate in issues of fact, to be tried by a jury; while others may result in issues of law, to be determined by the court. And whenever we come to a demurrer, whether it be to the plea, replication, rejoinder, or still further onward, the rule is to give judgment against the party who committed the first fault in pleading, if the fault be such as would make the pleading bad on general demurrer. This rule has always prevailed. It was the rule prior to the statute of Anne; and to say that the defendant, because he pleads two pleas, one of which results in a demurrer, cannot go back and attack the declaration, would be to deprive him of a portion of the privilege which the legislature intended to confer. He cannot plead and demur at the same time, because the common law forbids it; and the statute does not allow it. But he may plead two pleas; and he takes the right with all its legitimate consequences, one of which is, that whenever there comes a demurrer upon either of the two lines of pleading, he may run back upon that line to see which party committed the first fault; and against that party judgment will be rendered. Aside from the *dicta* in question, there is not a shadow of authority, either here or in England, for a different doctrine.

Although it seems that no case upon this point has found its way into the books, I well remember that since the decision in *Miller v. Maxwell*,<sup>1</sup> it has been several times announced from the bench that in a case like this the defendant was at liberty to go back and attack the declaration; and I think the point has been more than once directly decided. I know that the late Mr. Justice Cowen entertained and expressed that opinion, as I did myself; and it is also the opinion of my present associates. I would not lightly overrule so much as a mere *dictum*, if it was of the nature of a rule of property, and had stood long enough to become one. But this is not a question of that kind.

*Judgment for the defendant.*<sup>2</sup>

<sup>1</sup> 16 Wend. 9.

<sup>2</sup> *Bishop v. Quintard*, 18 Conn. 407 (*semble*); *Miller v. Maxwell*, 16 Wend. 9 (*semble*); *Shaw v. Tobias*, 8 Comst. 188, *accord*; *Brawner v. Lomax*, 23 Ill. 496; *Ward v. Stout*, 32 Ill. 899; *Culver v. Bank*, 64 Ill. 529; *Wheeler v. Curtis*, 11 Wend. 653 (*semble*); *Dearborn v. Kent*, 14 Wend. 188 (*semble*); *Russell v. Rogers*, 15 Wend. 351 (*semble*), *contra*. — Ed.

a demurrer reopens the whole case for the ad-  
 judication of the judge & the action goes against  
 the first bad plea.

Point.

## CHAPTER II.

## PLEAS BY WAY OF CONFESSION AND AVOIDANCE

## SECTION I.

*In Discharge.*

## GOULD v. LASBURY.

IN THE EXCHEQUER, TRINITY TERM, 1834.

[Reported in 1 Crompton, Meeson, &amp; Roscoe, 254.]

DECLARATION in debt on simple contract. Plea, that the defendant was discharged, under the Insolvent Debtors' Act, "from the debts and causes of action, if any, and each and every of them." Special demurrer, assigning for cause that the said plea did not confess and avoid the cause of action, &c.; and that the plea neither set out the discharge specially, nor was pleaded generally, in the form given by the statute.

? what statute?

*Erle*, in support of the demurrer. There are two defects in this plea: First, the well-known rule of law, that a plea must either traverse, or confess and avoid, is violated. A plea like this, of confession and avoidance, must admit and confess the matter stated in the declaration distinctly. *Taylor v. Cole*<sup>1</sup> is a decisive authority on this point. So in *Griffiths v. Eyles*,<sup>2</sup> where a hypothetical replication was attempted, Chief Justice Eyre said that the party could not plead hypothetically. The admission here is most clearly hypothetical. Secondly, if the statute gives a form of pleading, the party must either conform to that form, or must plead in the more special form, which the usual rules of law would present. *Sheen v. Garrett*.<sup>3</sup> Here the plea is general, that the party was discharged; but it does not follow the form given by the act, which contains no such words as "if any."

*Kelly*, contra. The general rule, that a party must traverse, or confess and avoid, every material allegation, is not disputed; the

<sup>1</sup> 8 Term Rep. 292.<sup>2</sup> 1 Bos. & Pull. 418.<sup>3</sup> 6 Bing. 686.

Case:—

Declaration:— Debt on simple contract.

Plea:— Defendant discharged under Insolvent's Debtors' Act "from the debts & causes of action, if any, and lack & error of them."

Special Direction:— Plea does not confess and avoid. Plea does not set out the discharge specially nor was pleaded generally, in the form given by the statute.

Held:— That the words, if any, vitiate the plea. They are not allowable as "supposed" would <sup>possibly</sup> be under the doctrine of protestation. The plea is not a confession sufficient in law.

In this case was apparently an implied denial & that Courts would not allow.

The objectionable thing is to have a plea, purporting to be affirmation really contain a denial.

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Rules with regard to pleas were changed by promulgation of Court according to Act of Parliament in 1834. Read them in Chitty, Stephen, or Statute, Eng. Statute, (end).

Old notion was that an express confession was necessary. "True it is" etc finally dropped.

New rule: "Facts not denied are admitted."

A Plea in discharge admits the cause of action but pleads that it has been satisfied. Other pleas in C. & A. admit facts but not the cause of action.

Insolvency  
Statute of him. (Accord and Satisfaction) } Common Pleas.  
Payment



24

question is, whether this plea does not substantially confess the matter in the declaration. Similar expressions are used in numerous instances and are to be found in all the forms in the books of pleading. In pleas of the Statute of Limitations, of infancy, of bankruptcy, of the Insolvent Debtors' Act, and of set-off, it is usual to use words of this description. The expressions, "if any such there be," or "the supposed," are common in all these forms. The usual words were "the supposed" causes of action, which is quite as hypothetical an expression as "if any." In a case of *Gale v. Capern*,<sup>1</sup> in the King's Bench, which is not yet reported, the declaration was for goods sold. There was a plea of set-off on a bill of exchange; the replication alleged that the "supposed" cause of set-off did not accrue within six years, upon which issue was taken. It was held at the trial that the handwriting of the acceptor and indorsers was admitted, and need not be proved. On motion for a new trial, it was contended that the word "supposed" prevented any such admission; but the court held that the word "supposed" did not at all alter the effect of the replication. [ALDERSON, B. You would contend that the expression "supposed" is no more than a protestation.] Exactly so. The object of the rule of pleading is not that there should be an absolute, unqualified, and express confession, but that there should be what may amount to a confession in the particular suit. There must be such a confession as will relieve the other party from the necessity of proving it. [LORD LYNDEHURST, C. B. The word "supposed" may perhaps be considered as no more than "alleged." I find the word "supposed" in several of the forms you have adverted to, but not the words "if any such there be."] In a plea in abatement for non-joinder, the words, "if any such there be," are invariably used. The defendant says sufficient if he admits for the purpose of the particular action, though he protests for the purpose of any other. The forms alluded to show that it is not necessary that the confession should be in the unqualified form contended for on the other side. If the plaintiff had replied generally, he would not have been bound to prove the cause of action at the trial. The present form is taken from a late edition of an approved book of pleading.

*Erle*, in reply. The plea does not amount to an unqualified admission. The admission is qualified and hypothetical. In *Taylor v. Cole*, Buller, J., said, "It is a rule in pleading that the party justifying must show and admit the fact." The illustration of the plea in abatement is unfortunate for the defendant. It is remarkable that the plea in abatement is the only instance in which the words, "if any such there be," are used. The word "supposed" is nothing more

<sup>1</sup> 1 Ad. & Ell. 102.

than "alleged." Now, when the case of a plea in abatement is considered, the exception in that case serves rather to strengthen the general rule. The rule as to confessing and avoiding is only applicable to a plea in bar. A plea in abatement need not confess and avoid; the defendant is not bound to traverse or confess all matters alleged; he has at that stage nothing to do but to show that the plaintiff may have a better writ, and the judgment is not to be that the plaintiff is to recover or not on the allegations upon the record, but that the writ be quashed, or that the defendant answer over. It is singular that it is only in the case of such a plea that the words "if any" appear to be usually adopted. The argument from the doctrine of protestations is equally inapplicable. If a person has to answer when he either is bound or chooses to answer one matter only, there are cases where he may take the other matters by protestation; but it is different as to the matter which a party assumes to be answering. Besides, the facts taken by protestation are admitted in the action by a well-known rule of law; but here the admission is coupled with a qualification. In *Gale v. Capern*, the only question was as to what was the issue to be tried. The handwriting was not in issue, but that had nothing to do with the question of the form of pleading. If it could be matter of doubt on the trial, we have a right to say on special demurrer that it is not well pleaded. [ALDERSON, B. In *Taylor v. Cole* and *Griffiths v. Eyles* the fact was in the peculiar knowledge of the party pleading.] So, here, the defendant must have known whether he was indebted or not.

LORD LYNDHURST, C. B. It is difficult to distinguish the expression "supposed" from that of "if any." As there has been a decision in which a construction is said to have been put on the word "supposed," we will confer with the judges of the other courts.

*Cur. adv. vult.*

On a subsequent day LORD LYNDHURST, C. B., said: In the case of *Gould v. Lasbury*, there was a plea of a discharge under the Insolvent Debtors' Act, which was contended to be bad, because it did not directly confess and avoid the matters alleged in the declaration, but merely stated the discharge from the said causes of action, "if any." A similar point having been argued in the King's Bench, we have conferred with the judges of that court on the subject, and we concur with them in thinking that the words vitiate the plea. The demurrer, therefore, must be allowed.

*Judgment for the plaintiff.*<sup>1</sup>

<sup>1</sup> *Griffiths v. Eyles*, 1 B. & P. 418; *Margetts v. Bays*, 4 A. & E. 489; *Martin v. Swearingen*, 17 Iowa, 846; *Anson v. Dwight*, 18 Iowa, 241; *Morgan v. Ins. Co.*, 87 Iowa, 859; *Conger v. Johnston*, 2 Den. 96; *Comm. Bank v. Sparrow*, 2 Den. 97; *Hart v. Meeker*, 1 Sandf. 623; *Hamilton v. Hough*, 13 How. Pr. 14, *accord*. See *McCormick v. Pickering*, 4 Comst. 276. Ed.

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Case:-

Debt for 20 £ ~~of~~<sup>7th</sup> goods sold & delivered.

Pleas-1. nonquam in debitatis. 2. {Payment of 20 £.

Special Demurrer: Concluding to country is wrong. Should be verification.

Held:- Plea bad. Payment must admit an original debt. This is confession and avoidance. New facts are introduced. Should have concluded with verification.

Debt can be brought:-

1. In a writing under seal for payment of fixed sum.

2. Promise for consideration as for work etc.

In 2nd class years assumpsit may also be brought.

Covenant when instrument under seal was not for fixed amount.

There can be a debt though without action for debt. When debt is not due.

Seems was a debt here but was discharged at maturity. Properly nonquam in debitatis should deny merely debt, but ~~Stilary~~ rules said it must <sup>have same scope</sup> ~~be~~ same as now assumpsit in in debitatis assumpsit. There could not deny debt or fact that it was due & so general issue would not cover point, was clearly matter of discharge.

*Take up later under debt.*

## GOODCHILD v. PLEDGE.

IN THE EXCHEQUER, EASTER TERM, 1836.

[Reported in 1 Meeson &amp; Welsby, 868.]

DEBT, in the sum of £20, for goods sold and delivered; for board, lodging, and other necessities, found and provided by the plaintiff for the servant of the defendant, and at his request; and on an account stated. Pleas: first, *nunquam indebitatus*; secondly, as to the first count, that before the commencement of the suit, and when the said sum of £20 in that count mentioned became due and payable, to wit, on the 1st of January, 1836, the defendant paid to the plaintiff the said sum of £20, according to the defendant's said contract and liability in the said first count mentioned: concluding to the country. The latter plea was specially demurred to, on the ground that it ought to have concluded with a verification.

*Mansel*, in support of the demurrer, relied on *Ensall v. Smith*.<sup>1</sup> The plea of payment is clearly treated in the new rules as a plea in confession and avoidance. It makes no difference that it is stated here that the defendant paid when the money became due according to the contract: he still admits the cause of action. The plea of *solvit ad diem* is an analogous one. [PARKE, B. There it is clearly new matter, being, in effect, a plea of performance of the condition in the bond.] The plaintiff has a right to an answer to the allegation of payment in the plea; and if it be true that the money was so paid, he may enter a *nolle prosequi* as to that part of the demand, and go on for the rest.

*The cond. in Subseq. is form so debt must set it up & also its performance.*

*Ogle*, contra. This plea is quite distinguishable from that in *Ensall v. Smith*. Here the declaration is in debt, not in assumpsit; and the defendant meets the claim by stating that, when the debt accrued, he paid the money according to his contract and liability. In *Ensall v. Smith*, the plea was merely that the defendant has paid the same; but here, if the payment was after breach, or after request, it could not be according to the contract and liability. It is a simple denial of the breach, not introducing new matter, and therefore rightly concludes to the country. The defendant shows that there never was any suable cause of action, because the moment the debt accrued, he paid it. [PARKE, B. Is the statement of the breach in debt any thing more than a mere form? The moment the goods are delivered, is there not a cause of action, throwing the proof of its discharge on the defendant? If the breach is mere form, you cannot traverse it; then your plea is

*not a mere form - can set it up*

<sup>1</sup> 1 C., M. & R. 522; s. c. nomine *Ansell v. Smith*, 8 Dowl. P. C. 198.

in discharge, and ought to conclude with a verification. Suppose *nil debet* pleaded, under the old form; would it not be sufficient to prove the debt contracted? The new general issue, that the defendant never was indebted, that is, at no instant of time, was framed for the express purpose of making all these defences pleadable by way of discharge.] This plea shows that the plaintiff never was entitled to sue.

LORD ABINGER, C. B. If this is payment, as it undoubtedly is, it is a plea in confession and avoidance within the new rules.

PARKE, B. I admit that this plea is distinguishable from that in *Ensall v. Smith*. But here also the defendant includes in the plea a something that is not alleged in the declaration; because it is not stated in the declaration that the defendant did not pay according to the contract. I think it will be found, on looking into the cases, that the statement of the breach is mere form; if so, the plea admits the debt, and is a plea in confession and avoidance; and it is so treated in the new rules. Under the general issue, as now framed, you deny the existence of a debt at any one time: if you admit a debt, you must plead every matter specially by which you seek to discharge it.

ALDERSON, B. If this is payment, it is payment of a debt; then it admits a debt; therefore it is in discharge, not in denial.

*Ogle* then obtained leave to amend, on payment of costs.

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### EAVESTAFF v. RUSSELL.

IN THE EXCHEQUER, JUNE 22, 1842.

[Reported in 10 Meeson & Welsby, 865.]

DEBT for goods sold and delivered, and on an account stated. Plea, that the said several supposed causes of action in the declaration mentioned did not accrue to the plaintiff within six years next before the commencement of the suit. Special demurrer, on the ground that the plea, although it professed to be pleaded in confession and avoidance, did not contain any sufficient confession that the plaintiff ever had any cause of action. Joinder in demurrer.

*Peacock*, in support of the demurrer. The term "supposed causes of action" does not amount to a sufficient admission that there ever was a cause of action in the plaintiff. *Gale v. Capern*<sup>1</sup> may perhaps be relied on for the defendant. There a plea of set-off stated that the plaintiff made his promissory note payable to A. C., which was duly

<sup>1</sup> 1 Ad. & E. 102; 3 Nev. & M. 868.

Cases:-

Orbit, for goods sold & delivered to on an account stated.

Plea:- that "suffered" causes of action did not accrue within 6 years.

~~Applicant~~ <sup>Defendant</sup> though professed confession & avoidance did not sufficiently confess.

Held:- That the word "suffered" was equivalent to "alleged" and did confess the matter in the declaration. Distinguishable from "if any" which form is only good in a plea in abatement.

In 9 Q.B.D. 858 cited Int. 39. The words "claimed & demanded" were held not to vitiate plea.





indorsed and delivered to the defendant after the death of A. C., by his administrator, and was unpaid. The plaintiff replied, that "the said supposed debt and cause of set-off, upon the said promissory note, did not accrue to the defendant within six years;" and it was held that the replication admitted not only the making of the note, but also the indorsement of it to the defendant. But that case is distinguishable, because there the replication expressly referred to the cause of action "upon the promissory note." In *Margetts v. Bays*, a plea that "the said supposed debt in the declaration mentioned, if any such there be, did not accrue within six years," was held bad, as not sufficiently confessing and avoiding the debt; and on *Gale v. Capern* being cited, Lord Denman, C. J., said, "That was after trial; but here the form of the plea is specially demurred to, which makes all the difference." [PARKE, B. *Gould v. Lasbury* is an authority against you. There this court, after conference with the Court of King's Bench, held that a plea in bar, which alleged that the defendant was discharged under the Insolvent Debtors' Act "from the said debts and causes of action, if any and each and every of them," was bad; but Lord Lyndhurst, in the course of the argument, observed that "the word 'supposed' may, perhaps, be considered as no more than 'alleged,'" and stated that he found that word in several of the forms adverted to at the bar, but not the words "if any such there be."] His Lordship afterwards says that "it is difficult to distinguish the expression 'supposed' from that of 'if any.'" [ALDERSON, B. Surely the supposed cause of action must mean the alleged cause. PARKE, B. In *Margetts v. Bays* the words made it doubtful whether any debt existed at all.]

*Udall*, contra, referred to *Gwillim v. Daniell*,<sup>1</sup> and was stopped by the court.

PARKE, B. There can be no doubt whatever that the word "supposed" is a sufficient admission of a cause of action. It is the usual and ordinary mode of pleading in cases of this nature; and I have seen instances without number, where, after a plea of the general issue, a special plea has followed, professing to answer the supposed causes of action in the declaration mentioned. The words "if any" stand on a different footing, and although sufficient in a plea in abatement, they are not so in a plea in bar, because they leave it doubtful whether any debt at all ever existed.

ALDERSON, B., and ROLFE, B., concurred.

*Judgment for the defendant.*<sup>2</sup>

<sup>1</sup> 2 C., M. & R. 68.

<sup>2</sup> *Gale v. Capern*, 1 A. & E. 102; *Gwillim v. Daniell*, 2 C., M. & R. 68; *Scadding v. Eyles*, 9 Q. B. 858, *accord.* — Ed.

## SECTION II.

*In Excuse.*

## (a) SPECIAL ASSUMPSIT.

## BRIND v. DALE.

IN THE EXCHEQUER, TRINITY TERM, 1887.

[Reported in 2 Meeson &amp; Welsby, 775.]

**ASSUMPSIT.** The declaration stated that the defendant, before and at the time of the making of the promise thereafter mentioned, was a common carrier of goods in and by a certain cart, from divers places to divers other places; and thereupon the plaintiff theretofore, to wit, on the 14th November, 1836, at the request of the defendant, caused to be delivered to him, as such carrier, a certain trunk containing certain goods and chattels therein particularly described, to be taken care of and safely and securely carried and conveyed by the defendant, as such carrier, in and by the said cart, from a place called Nicholson's Wharf to a place called Brook's Wharf, and there to be safely and securely delivered by the defendant for the plaintiff. The declaration then alleged in the usual terms a promise by the defendant safely to carry and convey and deliver the goods, and a breach in not carrying safely, whereby the trunk and its contents were lost.

Fifth plea, that at the said time when he, the defendant, received the said goods and chattels from the plaintiff, and at the time the said supposed promise of the defendant was made, an express condition and agreement was then made and entered into between the plaintiff and the defendant; that is to say, that whilst the defendant carried and conveyed the said trunk with the said goods and chattels in and by his said cart from the said place called Nicholson's Wharf to the said place called Brook's Wharf, he the said plaintiff would accompany and follow the said cart of the defendant, and watch and protect the said goods and chattels from being stolen or lost out of the said cart; but that the plaintiff, contrary to the said condition and agreement in that behalf, wholly neglected and refused to accompany and follow the said cart, or to watch and protect the said goods and chattels from being stolen or lost from the said cart; by reason whereof, and not by

Case:- Assumpsit.

Declaration:- Def. as a common carrier received a certain trunk to be delivered at a certain place. Def. lost the trunk.

Plea:- That when the supposed promise bet was made, Pltf. agreed, as a condition, that he would follow Defs. wagon & see that trunk was not stolen or lost. Pltf. did not do this & the loss of the trunk resulted from his neglect not that of Def.

Special Demurrer:- 1. The plea does not sufficiently confess. 2. Amounts to non-assumpsit.

Held:- That the plea though apparently in confession and avoidance was a direct denial of the contract stated in declaration. That the condition of following bet was a qualification of contract & hence plea bad.

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Special Assumpsit required for its maintenance an actual contract, & showing how the contract was broken.

General Assumpsit, where a promise to pay a previous debt is made. Later, the action was maintainable without the promise. Allowed in all cases <sup>debt in</sup> simple contract but not

Declaration in Spe. Assumpsit:-

1. Statement of Contract, promise Consideration.
2. All conditions precedent have been carried out.
3. Breach - Promise broken.

Whenever a Def. can clearly sue on a Counter Contract of equal amt. & important, it is a good defense.

In law of contracts difference between conditions precedent & Subsequent to purely one of form.

In law of property the condition Subsequent gives property for the time to be taken away in a certain event. In condition precedent the property does not pass until a certain Event.

reason of any negligence, carelessness, or improper conduct in the defendant or his servant, the said goods and chattels were lost. Verification.

Special demurrer, assigning for causes, first, that the said plea does not properly confess the promise in the declaration; secondly, that the matter of defence in the said plea amounts to the plea of non-assumpsit, and ought to have been so pleaded. The marginal note stated that the plaintiff would also contend that the plea was bad in substance, inasmuch as the engagement entered into by the plaintiff, without consideration, could not limit the defendant's liability as a common carrier.

*Barstow*, in support of the demurrer The defendant is in this dilemma,—either the plea amounts to the general issue, or it is no answer to the action. It sets up a contract different from and incompatible with that alleged in the declaration. The court then called upon

*W. H. Watson*, to support the plea. The declaration alleges the defendant to be a common carrier, and avers a delivery to him as such. Though that allegation be true, there may yet be a special agreement, by way of qualification of his general liability. [PARKE, B. The declaration says, the goods were delivered to be taken care of by the defendant; the plea says they were not.] The defendant says, in substance, "I admit I received the goods as a common carrier, but I made also a collateral agreement that the plaintiff should watch them." The defendant would have his remedy over against the plaintiff for not watching the goods pursuant to his agreement; and so, to avoid circuitry of action, it is set up in the plea in discharge of the plaintiff's cause of action. [PARKE, B. The effect of the agreement is to protect the carrier from theft or loss; that qualifies the contract.] If the court is of opinion that it amounts to a qualification of the plaintiff's contract, not to a substantial and collateral contract, the plea certainly cannot be sustained.

*Per Curiam.*

*Judgment for the plaintiff.*<sup>1</sup>

<sup>1</sup> *Sharland v. Leifchild*, 4 C. B. 529; *Weedon v. Woodbridge*, 13 Q. B. 470; *Morgan v. Pebrer*, 8 B. N. C. 457; *Williams v. Vines*, 6 Q. B. 355; *Nash v. Breeze*, 11 M. & W. 352; *Heath v. Durant*, 12 M. & W. 438; *Mounsey v. Perrott*, 2 Ex. 522; *Whittaker v. Mason*, 2 B. N. C. 359; *Smith v. Dixon*, 7 A. & E. 1, *accord*. See, as illustrating the same principle, *Adams v. Jones*, 12 A. & E. 455; *Jones v. Corbett*, 2 Q. B. 828; *Webb v. Spicer*, 18 Q. B. 899; *Weedon v. Woodbridge*, 13 Q. B. 480; *Smith v. Scott*, 6 C. B. n. s. 770; *Trott v. Smith*, 12 M. & W. 688. — Ed.

*The underlined are cases of  
general assumpsit.  
— cases of collateral*

## SMART v. HYDE.

IN THE EXCHEQUER, TRINITY TERM, 1841.

[Reported in 8 Meeson &amp; Welsby, 723.]

**ASSUMPSIT.** The declaration stated that, in consideration that the plaintiff would buy of the defendant a mare at a certain price, the defendant promised the plaintiff that the mare was sound, and averred as a breach that the mare was not sound.

The defendant pleaded, amongst other pleas, thirdly, that, before the promise, he the defendant sent the mare to a certain place for the sale of horses, called Lucas's Repository, there to be sold according to certain rules, which were in the words following: "Terms of private sale. A warranty of soundness, when given at this repository, will remain in force until twelve o'clock at noon of the day next after the day of sale, when it will be complete, and the responsibility of the seller will terminate, unless in the mean time a notice to the contrary, accompanied by the certificate of a veterinary surgeon, be delivered at the office of R. Lucas; such certificate to set forth the cause, nature, or description of any alleged unsoundness;" of all which the plaintiff, before and at the time of making the said promise, had notice. The plea then averred that the sale was a private sale, and that the promise, and the buying from the defendant, took place subject to the said rules and regulations touching the private sale of horses, and that the same were agreed to by the parties; and although the time limited by the said rules for the delivery of the notice and certificate had elapsed before the commencement of this suit, yet no such notice or certificate had been delivered by or for the plaintiff, at the office of the said R. Lucas. Verification.

Special demurrer, assigning for causes, that the plea amounted to the general issue; that whereas the plaintiff had declared on an absolute and unqualified undertaking that the mare was sound, the defendant had not confessed and avoided the same, nor had directly denied such promise, but had stated matters for the purpose of qualifying such promise, and of showing that the warranty remained in force only until twelve at noon of the day after the sale, and was a warranty against such unsoundness only as the plaintiff might discover within such period.

*Crompton*, in support of the demurrer. The plea attempts to show that there was a qualification of the warranty, and that the contract was different from that declared upon, and it therefore amounts to the general issue. [PARKE, B. The warranty, as set out in the

Whole condition is subsequent. in form though all such are conditions precedent in effect.

?

Cases:- Assumpsit.

Declaration:- Def. sold Plff. a man at a certain price, promising "that the man was sound," that, as a result, the man was not sound.

Plea:- That the sale & warranty were made under special rules by which if no notice of unsoundness were given within before noon next day the warranty "will be complete and the responsibility of the seller will terminate." That no notice had been given. Verification.

Special Demurrer: Plea answers to the general issue.

Held:- That the plea is good. The plea is not a contradiction of the declaration, but merely sets up new matter showing a limitation.

The difference between these cases is that of form. This is Condition subsequent. The first case is Condition precedent. B.V.D.

All conditions subsequent in form are in effect conditions precedent as far as contracts are concerned.

If the condition set forth in plea is subsequent in form it is not demurrable if precedent in form it is bad on special demurrer.



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declaration, is an absolute one. The plea admits the statement in the declaration, but sets out new facts, for the purpose of showing that there was no breach of contract; it does not deny a sale of the horse, or the warranty that the horse was sound.] On the warranty stated in the plea, there is to be no responsibility at all in certain cases, and that is a qualification which might have been given in evidence under the general issue. In *Bywater v. Richardson*,<sup>1</sup> where there was a similar condition, *Littledale, J.*, treats it as a qualified warranty. [PARKE, B. You say that the contract which would have to be proved would vary from that stated in the declaration, and therefore might be given in evidence under the general issue.] Yes. In *Latham v. Rutley*,<sup>2</sup> the declaration stated a contract to carry goods from London, and deliver them safely at Dover; the contract proved was to carry and deliver safely, fire and robbery excepted; and it was held to be a variance. Here the contract stated in the declaration is, that the defendant will be generally answerable for the unsoundness of the mare; but the contract stated in the plea is, that he will not be answerable at all, if the act be not done within a given time. In *Latham v. Rutley*, *Abbott, C. J.*, says, "The result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading; but if a stipulation be made that, under certain circumstances, he shall not be liable at all, that must be stated." [PARKE, B. The contract there stated was a contract to carry the goods safely, not a limited contract, if the goods were not affected by fire or robbery. Here the contract alleged is, that the defendant undertook that the mare was sound: that he is to be responsible if unsound is merely an inference from that.] Where a condition merely limits the amount of damages, it is true that it need not be stated in the declaration: *Clarke v. Gray*,<sup>3</sup> but where the contract, as in this case, is qualified by conditions, it is a variance to state it as absolute in its terms. In *Howell v. Richards*,<sup>4</sup> it was held, that, if a covenant for quiet enjoyment be restrained by any qualifying context, it must be stated, and if not, that the defendant might take advantage of it under the plea of the general issue, as being an untrue statement of the deed in substance and effect. *Tempany v. Burnaud*<sup>5</sup> and *Browne v. Knill*<sup>6</sup> are authorities to the same effect. In *Whitaker v. Mason*,<sup>7</sup> the plaintiff declared upon a contract of sale of certain books; the defendant pleaded that the books were sold subject and according to the usage and course of dealing observed among

<sup>1</sup> 1 Ad. & Ell. 508; 3 Nev. & M. 748.

<sup>2</sup> B. & Cr. 20; 3 D. & R. 211.

<sup>3</sup> 6 East, 564.

<sup>4</sup> 11 East, 638.

<sup>5</sup> 4 Campb. 20.

<sup>6</sup> 2 Brod. & B. 395.

<sup>7</sup> 2 Bing. N. C. 359; 2 Scott, 567

booksellers in London; to which the plaintiffs replied *de injuria*; and on demurrer to the replication, it was held that the plea in effect amounted to the general issue. [PARKE, B. There the plea set up a different contract; here the plea does not alter the consideration or the promise.] The omission to state the qualification entirely alters the legal effect of the contract. The case is distinguishable from *Syms v. Chaplin*,<sup>1</sup> which was an action against a coach proprietor for the loss of a parcel above the value of £10; for the omission to declare the value of the parcel did not qualify the nature of the contract, but was a matter which avoided it, and therefore required to be specially pleaded. The general rule is, that contracts are entire, and it is only an exception to that rule, that where a part of the contract does not affect the rest which is declared upon, such part need not be stated.

*J. Henderson*, contra. The plea is good. The truth of the facts stated in it is consistent with the contract alleged in the declaration. The defendant says, True it is I promised that the horse was sound, and it turned out to be unsound, but there were collateral circumstances which prevented your right to sue from arising. Where, indeed, the plea discloses a contract different from that alleged in the declaration, it is bad, as amounting to the general issue. The cases which have arisen since the new rules on *indebitatus assumpsit*, show that where, if the plea be true, the declaration is not, in that case the plea is open to demurrer, as amounting to the general issue. In *Latham v. Rutley*, the promise alleged was absolute, but the contract proved was a qualified one, and therefore did not support the promise declared on. But where there is an absolute promise, and the defence is that its efficacy has been destroyed by matters occurring subsequently, those matters must be specially pleaded. In *Hotham v. The East India Company*,<sup>2</sup> where there was a covenant in a charter-party, that no claim for short tonnage should be allowed, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights; it was held, that this not being a condition precedent to the plaintiff's right to recover for short tonnage, but a matter of defence to be taken advantage of by the defendants, the not averring performance was no ground for arresting the judgment. That case resembles the present. It was not necessary for the plaintiff to aver performance of the condition annexed to this warranty; it is sufficient for him to allege the contract and breach. The fact on which the defendant relies is collateral to the original contract, and therefore ought to be pleaded specially.

<sup>1</sup> 5 Ad. & Ell. 684; 1 Nev. & P. 129.

<sup>2</sup> 1 T. R. 688.





*Crompton*, in reply. The contract as set out in the plea affects the consideration stated in the declaration, for the plaintiff is bound to give notice of the unsoundness before a specified time, in order to render it an absolute warranty. *Hotham v. The East India Company* turns on the distinction between covenant and assumpsit, and on the rule which is peculiar to the former, that a party need not set out more covenants than those of the breach of which he complains; but that is not applicable to assumpsit. The condition which it is not requisite to state, is such a one as does not qualify the original promise. The narrow point is, does this plea affect the liability which the defendant is under, upon the contract alleged in the declaration? It is submitted that it does; it shows that he is not absolutely bound; whereas, on the contract as stated in the declaration, he is so. *Latham v. Rutley* is in point. [PARKE, B. In that case there was no promise to carry safely at all events; here there was an absolute warranty of soundness.]

PARKE, B. I am of opinion that the plea is a good plea, and that the defendant is entitled to judgment. The declaration states, that, in consideration that the plaintiff would buy a mare of the defendant, the defendant promised that she was sound. Then there is a special plea, which states, that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which provided that the warranty of soundness was to remain in force up to a certain time only, unless notice of the unsoundness was in the mean time given; and it goes on to aver that the sale took place subject to those rules, and that no notice was delivered within the time specified. It appears to me that such plea is not bad as amounting to the general issue. It admits the contract and the promise, but shows it to have been made subject to certain rules which have not been complied with. What is the meaning of those terms? It seems to me to be this, that the warranty shall be deemed to have been complied with, unless a notice and certificate shall be delivered to the vendor before twelve o'clock at noon of the day next after the day of the sale. That is not a denial of the warranty, but a mere condition annexed to it. No notice and certificate were delivered, and therefore the contract is to be considered as complied with. If the matter relating to the notice had been by way of proviso upon the warranty, it might perhaps have been necessary to state it in the declaration; but upon that point I give no opinion. It is enough to say that every word of this plea is consistent with the contract stated in the declaration.

ALDERSON, B. The meaning of the plea is, that there was a sort of conventional warranty of soundness, and that the warranty was to

be considered as complied with, unless a notice and certificate of unsoundness were given within a certain time, which was not done. That is not a denial of the contract, as alleged in the declaration.

GURNEY, B., and ROLFE, B., concurred.

*Judgment for the defendant.*<sup>1</sup>

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LYALL v. HIGGINS.

IN THE QUEEN'S BENCH, APRIL 25, 1843.

[Reported in 4 Queen's Bench Reports, 528.]

**ASSUMPSIT.** The declaration (first count) stated that plaintiffs, at the time of the making of the promise after mentioned, viz., on, &c., had engaged one Alexander Christie to act in the capacity of collecting clerk to them, the said plaintiffs, but were desirous of having, and required, security for the correctness of the pecuniary transactions of the said A. C. as such collecting clerk with plaintiffs previously to employing A. C. in the capacity aforesaid, whereof defendant then had notice; and thereupon afterwards, viz., on, &c., in consideration that plaintiffs, at the request of defendant and of one William Sands, would employ A. C. as such collecting clerk to plaintiffs as aforesaid, defendant and W. S. then guaranteed to plaintiffs the correctness of the pecuniary transactions of the said A. C. with plaintiffs, as such collecting clerk to plaintiffs as aforesaid, to the amount of £500, in manner following: that is to say, defendant then undertook and promised plaintiffs to be security to them to the amount of £250. And the said W. Sands, &c. (the like undertaking by Sands). Averment that plaintiffs, relying on the guarantee, &c., did thereupon, to wit, on, &c., employ A. C. as such collecting clerk to plaintiffs as aforesaid, and A. C. remained and continued in their employment as such collecting clerk for a long space, &c., viz., two years then next following; that, while A. C. so remained and continued, &c., he, A. C., as such collecting clerk, collected and received from divers persons divers debts and sums of money for and on account of plaintiffs and as their moneys, to a large amount, viz., to the amount of £20,000; yet A. C. did not correctly, honestly, and faithfully account for or pay the said moneys to plaintiffs, but, on the contrary, whilst he was such collecting clerk to plaintiffs as aforesaid, wrongfully converted and disposed of a great part, to wit, £500, part of the said moneys so by him collected

<sup>1</sup> See *Clarke v. Gray*, 6 East, 564; *Sharland v. Leifchild*, 4 C. B. 533; *Weedon v. Woodbridge*, 18 Q. B. 462. — Ed. *Tom v. Clark*. 3 Q. B. 194.

Case:- Assumpsit;

Declaration:- That the Defs. had guaranteed the accuracy & correctness of the pecuniary transactions of one Alexander Christie as clerk of Pltfs. in consideration of Pltfs. employing him as clerk.

Plea (2). That the said A.C. was already employed as clerk of Pltfs. when their guarantee was made & that they were not liable under the contract for the damages & security agreed upon.

Special Demures: Plea amounts to non-assumpsit & should have been so pleaded.

Held: That the plea was bad. It virtually declared no consideration to the contract, & therefore that there was no valid contract, & therefore was evidence under non-assumpsit. "It is now settled that the proper mode of traversing the consideration is by non-assumpsit."

Non-assumpsit denies both the promise & the consideration, if the consideration is lacking



there is no promise the consideration cannot exist.

Non assumpsit means "I didn't make the promise alleged for consideration alleged."

It does not mean "I didn't make a contract."

~~Supplicational Case~~

~~Declare on a bilateral contract void.~~

~~Plea Confession & new facts showing it to be no contract~~

~~Reple either traverse of new facts or~~  
~~Demurrer.~~

In bilateral contract the question whether it is a contract or not is one of law. In a unilateral case it may be so evident that there was no consideration that it becomes matter of fact & then Non assumpsit must be pleaded.

see p. 92. Lam. Acc. 66. Stephen (W). 184.  
1 Salk. 22.

and received as such collecting clerk to plaintiffs as aforesaid, to his own use; and thereby the pecuniary transactions of A. C. with plaintiffs, as such collecting clerk as aforesaid, became and were incorrect and deficient to that amount; of all which, &c.: notice to defendant, on, &c., and request to him by plaintiffs to pay them the £250. Breach, non-payment.

Plea 2. That, before defendant made the promise in the first count mentioned, and before plaintiffs desired or required security for the correctness, &c., as in that count mentioned, viz., on, &c., plaintiffs and A. C. had agreed together that plaintiffs should employ A. C., and that he should serve them, in the said capacity of collecting clerk to the plaintiffs as in the first count mentioned, for certain commission and reward to A. C. in that behalf; which agreement was in full force and effect, unexpired and undetermined, at the said time of making the defendant's promise in that count mentioned, and also at and during the period and times therein mentioned during which A. C. remained and continued in the employ of plaintiffs as such collecting clerk to them as aforesaid, as in the said first count mentioned. And that plaintiffs did not desire or require security for the correctness of the pecuniary transactions of the said A. C. as such collecting clerk as aforesaid, nor did defendant promise as in the said count mentioned, until after plaintiffs and A. C. had completely made and concluded the said agreement between them above mentioned. Verification.<sup>1</sup>

Special demurrer.

*Bain*, for the plaintiffs. The second plea does not confess and avoid, and amounts, at most, to an argumentative denial of the consideration.

*Erle*, contra. The second plea is good: it supplies the fact, not disclosed by the declaration, that the plaintiffs had agreed to employ Christie before they desired security from the defendant; and their doing what they were already bound to do was no consideration for the defendant's promise. *Stilk v. Meyrick*; <sup>2</sup> *Jones v. Waite*,<sup>3</sup> judgments of Patteson, J.,<sup>4</sup> Lord Abinger, and Lord Denman, C. J.<sup>5</sup> [LORD DENMAN, C. J. Your plea introduces a different agreement between the plaintiffs and defendant from that stated in the declaration. Ought that to be specially pleaded?] The plea only avoids the contract declared on. It alleges that such a contract was in fact made, but the plaintiffs were bound already. [PATTESON, J. You do not deny the promise, or the fact stated as the consideration, but contend that you

<sup>1</sup> Only so much of the case is given as relates to the second plea. — Ed.

<sup>2</sup> 2 Camp. 317; s. c. 6 Esp. N. P. C. 129. See *England v. Davidson*, 11 A. & E. 866.

<sup>3</sup> 5 New Ca. 341.

<sup>4</sup> Page 351.

<sup>5</sup> Page 356.

<sup>6</sup> Pages 358, 359.

now find the agreement to have been *nudum pactum*; that, although the plaintiffs professed that they would employ Christie at the defendant's request, they did not do it on his request, being already bound.]

*Bain*, in reply.

LORD DENMAN, C. J. I am of opinion that the plaintiffs are entitled to judgment on the second plea. It sets up a different consideration from that which the declaration alleges; and the matter might have been given in evidence on non-assumpsit. It is not a confession, but adds something to the statement in the declaration, which makes a different contract.

PATTESON, J. The second plea is a denial of the alleged consideration, namely, that the plaintiffs, at the defendant's request, would employ Christie. It is now settled that the proper mode of traversing a consideration is by plea of non-assumpsit. It has been suggested that the plaintiffs might have previously engaged Christie, and yet that their promise to employ him in future might have been at the defendant's request. But, if it turns out on the pleading that they did not agree to employ Christie at the defendant's request, but had so agreed before it was made, that is a denial of his being employed at the request of the defendant. The consideration, therefore, is denied; and the plea should have been non-assumpsit.

WILLIAMS, J. The second plea turns only on a different mode of interpreting the contract from that adopted in the declaration. The plea should have been non-assumpsit, and the defence under it would have been variance.

*Judgment for plaintiffs on the second plea.*<sup>1</sup>

## SIEVEKING AND ANOTHER v. DUTTON.

IN THE COMMON PLEAS, JUNE 11, 1846.

[Reported in 8 Common Bench Reports, 331.]

ASSUMPSIT. The first count of the declaration stated that the plaintiffs, at the request of the defendant, agreed to supply the defendant, and the defendant ordered of the plaintiffs, divers large quantities of wool, to be purchased by him upon certain terms, that is to say,

<sup>1</sup> Sutherland v. Pratt, 11 M. & W. 296; Raikes v. Todd, 8 A. & E. 854; Wade v. Simeon, 2 C. B. 548; Breech v. White, 12 A. & E. 670; Weedon v. Woodbridge, 13 Q. B. 481, *accord*; Passenger v. Brookes, 1 B. N. C. 587, *contra*. — Ed. *Bill*

*v. Melch. 9 C. B. 154.*  
*11 M. & W. 849.*

*W. says "not contra."*  
*8 C. B. 78 ac.*

## 1. Bilateral Contract:-

- a. No consideration stated. *Dismissed.*
- b. Insufficient consideration stated. { *Dem. or special Plea*
- c. Consid. not performed. (If not also a condition - no defense)

## 2. Unilateral Contract.

- a. No Consid. stated. *Dismissed.*
- b. Insufficient Consid. stated. { *Dem. or special Plea*
- c. Consid. not performed. *Non-ass.*

## Accompit. Agreement

Declaration. ON part of Pltfs. to sell Defs. certain quantity of wool at certain price, on part of Defs to buy the wool & pay price agreed w. Agreement that Pltfs. had offered to deliver said wool wt. & mark, Defs. refused to accept it.

Plea. that Pltfs. promised to deliver & sell Defs. wool of a certain kind per sample wt. & that wool tendered was of a different & inferior kind.



&c.; that, in consideration thereof, and that the plaintiffs, at the like request of the defendant, then promised the defendant to deliver the said quantities of goods to the defendant, according to the said contract, the defendant then promised the plaintiffs to accept the said goods, and to pay for the same according to the terms of the said contract. Averment, that the plaintiffs had always been ready and willing, and afterwards, to wit, on, &c., tendered and offered to deliver the said goods to the defendant, according to the terms of the said contract, &c. Breach, that the defendant refused to accept them.

Plea, that, at the time of the defendant's ordering the said quantities of wool, and making the said promise, as in the first count of the declaration alleged, the plaintiffs produced and showed to the defendant a certain sample of the said wool, and then promised the defendant to deliver the said quantities of wool to the defendant, and that the whole of the said quantities of wool were equal in quality and description to the said sample; that the defendant then ordered the said quantities of wool, and made the said promise, as in the said first count mentioned, on the faith and terms, and in consideration of the said promise of the plaintiffs, and not otherwise; but that the said quantities of wool, at the time when they were so offered and tendered for delivery by the plaintiffs as in the said first count mentioned, were not equal in quality and description to the said sample, but, on the contrary thereof, the same were of a very inferior and bad and indifferent quality and description, and of much less value, and of no use or value to the defendant; whereupon and wherefore the defendant then refused to accept the said wool, or pay for the same; as he lawfully might, &c. Verification.

To this plea the plaintiffs demurred specially, on the ground, amongst others, that it amounted to non-assumpsit.

*Dowling*, Serjt., in support of the demurrer. The declaration alleges an absolute contract on the part of the defendant to receive the wool, without any condition as to quality, or any specific description. The plea alleges that the contract was for a sale of wool, with a warranty that the bulk was equal to sample: that introduces a qualification into the contract, and amounts to a mere denial of the contract declared on. *Morgan v. Pebrer*; <sup>1</sup> *Nash v. Breeze*; <sup>2</sup> *Heath v. Durant*.<sup>3</sup>

*Channell*, Serjt., *contra*. Had this been pleaded to a count in *indebitatus assumpsit* for goods sold and delivered, or goods bargained and sold, the plea would undoubtedly have been open to the objection suggested. But the difficulty here arises from the new rules, which provide that the plea of non-assumpsit shall operate only as a denial

<sup>1</sup> 2 N. C. 457; 4 Scott, 280.

<sup>2</sup> 11 M. & W. 352.

<sup>3</sup> 12 M. & W. 438.

*This is a case of sale with warranty.*

in fact of the express contract or promise alleged, or of the matter of fact from which the contract or promise alleged may be implied in law. This plea does not deny the express contract alleged in the declaration; on the contrary, it admits it; and it seeks to justify the refusal to accept the wool, by showing that it differed in quality from that which the plaintiffs contracted to deliver. [MAULE, J. The contract stated in the declaration is for the delivery of wool of a merchantable quality. TINDAL, C. J. Upon non-assumpsit the plaintiffs would be non-suited, if they proved a contract other than that alleged. CRESSWELL, J., referred to *Parker v. Palmer*.<sup>1</sup> MAULE, J. If issue were taken on the tender, the plaintiffs would fail unless they proved a tender of wool of the quality and description ordered.] The plea, at all events, complies with the spirit of the new rules. [MAULE, J. The defendant should certainly be allowed to plead this defence, if it is not open to him under non-assumpsit.]

*Dowling*, Serjt., in reply. The plea in question clearly amounts to no more than a denial of the contract alleged in the declaration. [TINDAL, C. J. The contract set up by the plea is not necessarily incompatible with that stated in the declaration.] It is difficult to see how the two could coexist. [MAULE, J., referred to *Street v. Bay*.<sup>2</sup>]

The court, after some deliberation, were about to pronounce judgment in favor of the plea, when *Dowling*, Serjt., prayed leave to withdraw the demurrer; which was granted, upon the usual terms.

*Rule accordingly.*<sup>3</sup>

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*In Excuse — (continued).*

(b) GENERAL ASSUMPSIT.

HAYSELDEN v. STAFF.

IN THE KING'S BENCH, MAY 27, 1886.

[Reported in 5 *Adolphus & Ellis*, 158.]

*Indebitatus assumpsit* for (among other considerations) the price and value of work done, and materials provided for the same; promise to pay on request.

Plea (among others) as to non-payment of £1 0s. 9d., parcel of the

<sup>1</sup> 4 B. & Ald. 387.

<sup>2</sup> 2 B. & Ad. 456.

<sup>3</sup> See *Parker v. Palmer*, 4 B. & Al. 387; *Sharland v. Leifchild*, 4 C. B. 529; *Wood v. Woodbridge*, 13 Q. B. 462 — Ed.

*Contra* see 17th plea in *Heath v. Durant*,  
12 M. & W. 438

Illegality must be specially pleaded  
Stephen (W.) 184, g. One can contra.

Alteration of writing after making  
must be specially pleaded. 11 Mo. 77.

By new Rules all matters which  
make contract void or voidable  
must be specially pleaded. #

### Indebitatus Assumpsit.

Declaration: Work done, materials furnished  
for creating a debt; promise to pay on  
request.

Plea: that the work done, materials furnished  
for was to repair a certain chimney  
to prevent it from smoking under  
an agreement that unless chimney  
ceased smoking he should not be paid.

S. Demurrer; that this amounted to the  
general issue &c.

Held that the plea was bad. It directly  
denied the debt & therefore  
amounted to general issue. The Ct.  
... and the new rules



and that some facts which might be given under general issue could also be specially pleaded. This ~~case~~ <sup>plea</sup> however comes under neither class, i.e. : such as must be specially pleaded or such as may be either specially pleaded or offered under general issue.

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In General Assumpsit no actual or implied promise necessary. There must be a debt.

Declar:- Must show debt & then "the Deft. being thus indebted promised to pay"; that he did not pay. ———

Gen'l Assumpsit may be brought as well as Spe. Assumpsit when you have both a promise & a debt. ———

Wherever a promise is implied in fact then you can bring

above, that the said work and materials were work done and materials provided for the same by the plaintiff for the defendant in and about the endeavoring to prevent a certain chimney from smoking, and upon the terms, agreement, and understanding that the plaintiff should not be paid for the said work and materials, or any part thereof, unless he should succeed in preventing the said chimney from so smoking as aforesaid. Averment, that plaintiff hath not succeeded, &c. Verification.

Demurrer, assigning for causes, that the plea amounts to the general issue, and is argumentative, and an evasive and indirect denial of the cause of action, and does not sufficiently traverse, or confess and avoid it.

The case was now argued.<sup>1</sup>

*Busby*, for the plaintiff. The plea, instead of confessing the contract, alleges matter to show that it never was made as alleged in the declaration; it is therefore bad, and falls within the principle of the cases collected in Com. Dig. Pleader (E. 13), and (E. 14). It is true that not only matter in confession and avoidance may be specially pleaded, but also matter of law which may be given in evidence on the general issue. In *Carr v. Hinchliff*<sup>2</sup> the plea was upheld on both these principles. But the present case does not fall within either. The case is the stronger, because here the plea goes to a part only of the consideration; and therefore the unnecessary prolixity, which is the fault against which the rule was intended to guard,<sup>3</sup> is aggravated.

*Martin*, contra. The plea is good, whether considered with reference to the new rules, or independently of them. The declaration alleges a performance of work and supply of materials at the defendant's request; and from the fact so alleged it seeks to raise a legal implication of a promise. The general issue would amount to a denial of that fact, and of nothing more;<sup>4</sup> but that fact is here admitted; the plea therefore suggests a defence which the general issue would not raise. It is assumed on the other side that a plea in confession and avoidance, to a declaration in *indebitatus assumpsit*, must confess the debt; whereas it need only confess the fact alleged as the ground of implying the promise. That being confessed, a *prima facie* right in the plaintiff is admitted, which the defendant is to avoid by new matter. Thus, in the new rules of pleading, it is said<sup>5</sup> that, in *indebi-*

<sup>1</sup> Before Lord Denman, C. J., Littleton, Patteson, and Williams, JJ.

<sup>2</sup> 4 B. & C. 547.

<sup>3</sup> See *Warner v. Wainsford*, Hob. 127 (ed. 5)

<sup>4</sup> Rule, H. 4 W. 4, *Assumpsit*, 1, 5 B. & Ad. vii.

<sup>5</sup> 5 B. & Ad. vii., viii.

*tatus assumpsit* for goods sold and delivered, non-assumpsit denies merely the sale and delivery in point of fact. Here the plea certainly shows that the contract was conditional; but it lay upon the defendant to allege the condition and deny its performance, as he could not deny the substantive fact. [LITLEDALE, J. Certainly the new rules so far treat a contract with a condition and without it, as the same thing, that they do not allow separate counts on each.]<sup>1</sup> The cases given in the new rules, under Assumpsit 3,<sup>2</sup> show that the special plea need not confess the debt, but only the fact which *prima facie* raises a promise. Thus, coverture, illegality of consideration, unseaworthiness, misrepresentation, concealment, are all matters which show that the debt never arose; yet they are to be specially pleaded, because they do not deny the fact alleged as the foundation of the debt. In *Potts v. Sparrow*,<sup>3</sup> it was held that an objection to an action of assumpsit for the costs of preparing an illegal agreement could not be taken on a plea of non-assumpsit, though it was urged that the new rules applied only where the illegality objected to was in the contract, the breach of which was the subject of the action itself. *Edmunds v. Harris*<sup>4</sup> goes much beyond the present case. [LORD DENMAN, C. J. If that decision be correct, no doubt it is an authority in your favor; but some of the other cases put by you are instances of facts *dehors* the contract, and where, but for such facts, there would be a good contract. Perhaps the rule as to goods sold and delivered is not expressed so correctly as it might be.] Here that has been done for the defendant upon which, but for the matter alleged in the plea, the plaintiff would have an implied right to sue. [PATERSON, J. It has been said that the "denial of the sale and delivery in point of fact" means, of the sale and delivery laid in the declaration; that is, a sale and delivery to be paid for on request; and that, if it appear that the payment was to be on a future day, or upon condition, the sale and delivery alleged are negatived; and that therefore such a defence amounts to the general issue.] The plea here, correctly speaking, does not show that the plaintiff was to be paid only if a certain event occurred, but that his right was to be defeated in case of the non-occurrence of the event: that is not a traverse, but new matter. In *Waddilove v. Barnett*<sup>5</sup> the declaration was in assumpsit for use and occupation; and it was held that the defendant could not, under the general issue, show that after the rent became due he had received notice from a party to whom the plaintiff had mortgaged the premises before the occupation commenced, and that he had paid such party accordingly. [LORD

<sup>1</sup> R. H. 4 W. 4, General Rules and Regulations, 5, 5 B. & Ad. ii.

<sup>2</sup> 5 B. & Ad. viii.

<sup>3</sup> 2 A. & E. 414; s. c. 4 N. & M. 182.

<sup>4</sup> 1 New Ca. 594.

<sup>5</sup> 2 New Ca. 538.

## Special Assumpsit.

You can sue a thief in general as-  
umpsit for goods stolen.

In majority of cases of General as-  
umpsit, Special Assumpsit might  
also be brought.

The forms set in Gen'l Ass. are  
more simple & hence a preference  
to Special Assumpsit.

Anything showing that debt  
did not exist is admis-  
sible under non-umpsit  
in Gen'l Assumpsit.

The Dept's argument is that non-as-  
umpsit does not deny the debt  
but only the facts which Pltff.  
alleges raises the debt is that?  
if Dept. can admit the facts  
& alleges others which show that  
debt never came into existence  
he can plead in C.O.A. Court  
holds this argument wrong.

this refers to same point as in King -  
v. Rothau. Not law.

DENMAN, C. J. There the defence went to show that the plaintiff was not the real owner.] That could not have been the principle of the decision; for such a principle would also apply to rent becoming due after the notice from the mortgagee; whereas it was held that, as to this, the defence might be shown under non-assumpsit. The principle was that, as to the last-mentioned rent, the occupation by the sufferance and permission of the plaintiff, which was the fact raising the contract, was negatived by the evidence: as to the rent due before the notice, such occupation was not negatived but admitted; and therefore matter showing that, though the fact raising the contract was true, still the debt had not arisen, was held not to be admissible in proof under non-assumpsit.

Then, independently of the new rules, this matter might be specially pleaded. It is necessary only that a special plea of this kind should, as this does, give color to the plaintiff. Stephen on Pleading, 421 (ed. 8). Carr v. Hinchliff<sup>1</sup> shows this, and proves that a plea does not necessarily amount to the general issue, because the defence which it suggests might have been shown under the general issue. Bird v. Higginson<sup>2</sup> is to the same effect. [*Busby*. The court did not expressly decide that point. LITTLEDALE, J. They gave judgment for the defendant, though the objection was assigned on special demurrer to the plea. In special actions on the case for disturbance, every one knows that the answer may be pleaded specially.] And that, whether it be by way of confession and avoidance, or by way of raising a question of law. [LITTLEDALE, J. It is said in Com. Dig. Pleader (E. 14) that this objection should be taken by motion, not by demurrer.<sup>3</sup> That seems not to be considered law now.<sup>4</sup>] *Cur. adv. vult.*

LORD DENMAN, C. J., on a subsequent day of this term (June 13th), delivered the judgment of the court. After stating the declaration, the plea, and the demurrer, and causes assigned, his Lordship proceeded as follows:—

It must be first considered, whether the defence set up in the plea could be given in evidence under the general issue of non-assumpsit; because, if it could not, then there is no ground for the demurrer.

There is no doubt but it might be so before the new rules, because not only might the fact of the actual contract itself be denied, but also it might be proved that it was void in law, or that the contract itself had been performed, or that the defendant was excused from the performance of it by many other circumstances.

But, since the new rules (and which have the force and effect of an

<sup>1</sup> 4 B. & C. 547.

<sup>2</sup> 2 A. & E. 696.

<sup>3</sup> Citing Warner v. Wainsford, Hob. 127 (ed. 5), and Ward and Blunt's Case 1 Leon. 178.

<sup>4</sup> See Stephen on Pleading, 421 (ed. 8).

*show  
laxity of  
old rules.*

act of Parliament) in actions of assumpsit, "the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." In actions of assumpsit for goods sold and delivered, the plea of non-assumpsit will operate as a denial of the sale and delivery in point of fact. And "in every species of assumpsit all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded."

One of the general objects of these new rules was to compel a defendant to put his defence specially upon the record. And in conformity with this object the case of *Edmunds v. Harris*<sup>1</sup> was decided. It was an action of debt for goods sold and delivered, to be paid for on request, and which as to this is the same thing as *indebitatus assumpsit*; to which there was a plea of never indebted; and it appeared on the trial that the goods were sold on a credit which had not expired when the action was brought; and, on a question whether this defence was admissible on the general issue, the Court of King's Bench held it was not, and that it ought to have been specially pleaded, and that it was one of the cases which the new rules were framed to avoid. But that case was doubted in *Taylor v. Hilary*,<sup>2</sup> on the ground that, if the time of credit has not expired, the plaintiff proves a different contract from that which he has stated in the declaration, which was to pay on request. And so also in *Knapp v. Harden*,<sup>3</sup> Parke, B., considered it as doubtful whether *Edmunds v. Harris*<sup>1</sup> was properly decided. We think, therefore, that the case of *Edmunds v. Harris*<sup>1</sup> cannot be considered as a binding authority; and, if not, as the defence set up on this record shows a different contract from that which is stated in the declaration, inasmuch as the contract stated in the plea is that the money should be paid on a certain condition which has not been performed, it is not a contract to pay upon request; and therefore the defence might be gone into upon the general issue.

And in the case of *Waddilove v. Barnett*<sup>4</sup> it was held, in an action for use and occupation, that, under the issue of non-assumpsit, the defendant might give in evidence that the plaintiff had mortgaged the premises before the defendant came into the occupation, and that the mortgagee had given notice to the defendant not to pay the plaintiff any rent becoming due after such notice. And this was determined by the court after considering the effect of the new rules.

<sup>1</sup> 2 A. & E. 414; s. c. 4 N. & M. 182.

<sup>2</sup> 1 Cr., M. & R. 741; s. c. 5 Tyrwh. 878.

<sup>3</sup> 1 Gale, 47. See also *Jones v. Nanney*, 1 M. & W. 338.

<sup>4</sup> 2 New Ca. 583.

*Edmunds  
v.  
Harris.*

In *Keil Assumpsit* the fact that the debt is not due may be shown under non-as.

~~Right in authority~~ <sup>1/11/18</sup> but ~~wrong in principal as there really is a debt though not due.~~

~~See~~

Broomfield v Smith

Non-assumpsit proper plea as principal for though debt existed law will not simply promise until debt is due.



This was law before the Hilary  
rule but does not seem to  
have been law after ward &  
in reason should not be. It  
arose from the history of the  
general issue. At first it  
was restricted almost as  
under Hilary rules & then many  
things had to be pleaded spe-  
cially. As it was extended  
these things that once had  
to be pleaded specially were  
still allowed to be so pleaded  
as well as proven under the  
general issue.

← But, though the defence might be gone into under the general issue, it does not necessarily follow that the defence may not be specially pleaded on the record.

In the case of *Carr v. Hinchliff*<sup>1</sup> a defence was put upon the record, which, it was admitted, might have been gone into upon the general issue, and yet allowed to be a good plea. It was an action for goods sold and delivered; and the plea was that the goods were sold by a third person as the agent of the plaintiff, with the proper averments of want of knowledge, &c.; and then the defendant set off a debt due from that third person. The question was much considered in that case; but there was, in the first instance, a complete contract admitted by the plea of the *prima facie* liability of the defendant to the action, because, independently of the set-off, the defendant would have been liable; there was therefore a confession of the contract stated by the plaintiff; but the plea stated matters which avoided it so far as to exonerate the defendant from the performance of it.

There is a great distinction between the case of a plea which amounts to the general issue, and a plea which discloses matter which may be given in evidence under the general issue. Under the latter, as has been observed in the earlier part of this judgment, the various things enumerated may be given in evidence under the general issue, independently of any of the new rules; but it is incorrect language to say that these things amount to the general issue: they only defeat the contract; but what, in correct language, may be said to amount to the general issue is, that, for some reason specially stated, the contract does not exist in the form in which it is alleged, and, where that is the case, it is an argumentative denial of the contract, instead of being a direct denial; and which, according to the correct rule of pleading, is not allowed.

The allegation in the declaration is that the defendant is indebted for work, and labor, and materials; and that, being so indebted, he promised to pay on request. The plea does not confess that the defendant was indebted at all; it admits that work was done, and materials were found and provided: but, instead of confessing that any debt was created by that, and showing any thing to avoid it, he says that no money was to be paid unless the chimney was cured of smoking, which was not done; and which is really saying, in the most distinct terms, that no debt ever arose, and therefore falls completely within the meaning of what may be termed an argumentative denial of the debt.

In *Solly v. Neish*<sup>2</sup> the declaration was for money had and received. The defendant pleaded that the money was the proceeds of goods

<sup>1</sup> 4 B. & C. 547.

<sup>2</sup> 2 C., M. & R. 855; s. c. 5 Tyrwh. 625; 1 Gale, 227.

*Carr v. Hinchliff.*

pledged to the defendant, with a power of sale, by persons who were allowed by the plaintiffs to hold the goods as their own, and which, in fact, were the property of those persons and the plaintiffs, and that the defendant was willing to set off against the proceeds of the goods the advances made on them. There were subsequent pleadings which led to a demurrer. The court, though they gave judgment for the defendant, said the plea would be bad on a special demurrer. In *Gardner v. Alexander* the declaration was for goods bargained and sold; the defence was that they were sold under a special contract that they should be shipped within the current month and landed in London within a given time, which was not done. On an application to plead several matters, the question was, whether these facts could have been given in evidence under the general issue, or whether it was necessary to plead them specially. The Court of Common Pleas said it was unnecessary to plead them; the special contract might be given in evidence under the general issue. And in *Cousins v. Paddon*,<sup>1</sup> in the Exchequer, Michaelmas term, 1835, it was held that, in debt for goods sold and delivered, and work and labor, the defendant may give in evidence, on the general issue of never indebted, that the goods were worthless and the work useless.

Upon the whole, therefore, we are of opinion that the plea now before us cannot be supported, and that there must be judgment for the plaintiff.

*Judgment for the plaintiff.*<sup>2</sup>

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*In Excuse — (continued).*

(c) TRESPASS.

EARL OF MANCHESTER AND OTHERS *v.* VALE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1666.

[Reported in 1 *Saunders*, 27.]

TRESPASS. The plaintiffs declare that the defendants, on the 29th of September, in the seventeenth year of the reign of the now king,

<sup>1</sup> 2 C., M. & R. 547; s. c. 5 Tyrwh. 535.

<sup>2</sup> GOODS BARGAINED AND SOLD, — GOODS SOLD AND DELIVERED: *Payne v. Hales*, 5 M. & W. 598; *Dicken v. Neale*, 1 M. & W. 556; *Dawson v. Collis*, 10 C. B. 523. WORK AND LABOR: *Jones v. Nanney*, 1 M. & W. 333; *Hill v. Allen*, 2 M. & W. 283; *Cleworth v. Pickford*, 7 M. & W. 314. MONEY PAID: *Worrall v. Grayson*, 1 M. & W. 166; *Gregory v. Hartnoll*, 1 M. & W. 183; *Morgan v. Pebrer*, 3 B. N. C. 457; *Maude v. Meesham*, 6 Dowl. 570. MONEY HAD AND RECEIVED: *Owen v. Challis*, 6 C. B. 115; *Sally v. Neish*, 2 C., M. & R. 355; *Coupland v. Challis*, 2 Ex. 682; *Williams v. Vines*, 6 Q. B. 355. ACCOUNT STATED: *Jacobs v. Fisher*, 1 C. B. 178, *accord.* — *Ed*

Necessary allegations in trespass:

Possession by Pltf. or equivalent.

Entry by Deft. " " .

### Trespass.

Declaration:- Trespass by Defs. on Pltf's close by breaking into & treading down grass & eating grass by cattle &c.

Plea: As to vic & amiss & amiss mentioned not guilty. As to residue in fact that Sir Thomas Bridges had a right to common on said property & that Sir Thomas caused cattle &c to be put in there & hired Def. to look after cattle & that cattle bring there Deft. went in <sup>by order of Sir Thomas</sup> to see that no harm befall them & trampled down the same which is the residue &c -

Special. Demurred on ground that Def. has ~~assumed~~ <sup>justified</sup> a trespass which is no trespass for he must either have owned the cattle or put them in there himself. The Def. has not confessed trespass. Plea bad in part & hence bad as a whole. Held, accordingly. J. for Pltff.

Then the fault was <sup>not</sup> that the plea did not explicitly deny but did argumentatively traverse amounting to not guilty.

Plea virtually said I did not trespass with cattle.

\*He could only be liable for trespass with cattle on two suppositions (1) his cattle, (2) he put them in. Plea says not his cattle & not put in by him so as to cattle amount to not guilty. The good justification for entering himself is vitiated by the fault as to the cattle.

broke the close of the plaintiffs, called Marking and Yonder Moore, in the parish of Westmarke, in the county of Somerset, and the grass there with feet in walking trod down, and other the grass there with cattle, to wit, horses, oxen, cows, swine, and sheep, eat up, with a *continuando*, &c. The defendant as to the force and arms, and the trespass with swine, pleads not guilty, and to the residue of the trespass, he pleads in bar, that Sir Thomas Bridges, knight, was seised of the manor of Wedmore with the appurtenances in the said county, in his demesne as of fee, and prescribes in the said Sir Thomas for common in the place where, &c., for all his commonable cattle levant and couchant upon the said manor at every time of the year, as appurtenant to the said manor. And further says, that the said Sir Thomas constituted and appointed the defendant to take care of his cattle put into the said close which, &c. And he further says, that the said Sir Thomas caused to be put divers commonable cattle of the said Sir Thomas Bridges which at the time when, &c., were in the said place where, &c. Whereupon the defendant, as servant to the said Sir Thomas Bridges at the time when, &c., entered into the said close in which, &c., to see the said cattle there, lest any damage should happen to them; and in entering he trod down the grass there, which is the same residue of the trespass, and this, &c. Wherefore, &c., upon which the plaintiffs demurred in law.

And it was objected on the part of the plaintiffs, that the defendant in his bar hath only said that the cattle were in the place where, &c., but not that he put them there. And it appears that the cattle were not the defendant's own cattle, and therefore, if he did not put them into the place where, &c., he is not guilty: for a man cannot be guilty of trespass with cattle, unless they are his own cattle, or he actually put them into the place where, &c. And here the defendant has justified the trespass with cattle, and yet has not confessed it, nor said any thing to such purpose. Then the plea being bad in part, is bad for the whole, although he has justified some part well; for an entire plea cannot be good in part, and bad in another part; because such an entire plea is not divisible. *Pendlebury and Elmott*; <sup>1</sup> *Kent and Sponder*; <sup>2</sup> *Ascue v. Sanderson*; <sup>3</sup> *Sir John Thorne v. Lassels*.<sup>4</sup> And of such opinion was all the court. And judgment was given for the plaintiff *Saunders*, of counsel with plaintiff.

NOTE. — There was another fault in the plea, because it was not averred that the cattle were levant and couchant; but this was not moved.

<sup>1</sup> Cro. Eliz. 268.

<sup>2</sup> Cro. Eliz. 434

<sup>3</sup> Cro. Eliz. 381

<sup>4</sup> Cro. Jac. 27.

## GIBBONS v. PEPPER.

IN THE KING'S BENCH, EASTER TERM, 1695.

[Reported in 1 Lord Raymond, 88.]

TRESPASS, assault, and battery. The defendant pleads that he rode upon a horse in the king's highway, and that his horse being affrighted ran away with him, so that he could not stop the horse; that there were several persons standing in the way, among whom the plaintiff stood; and that he called to them to take care, but that, notwithstanding, the plaintiff did not go out of the way, but continued there; so that the defendant's horse ran over the plaintiff against the will of the defendant; *quae est eadem transgressio*, &c. The plaintiff demurred. And Darnall, Serjt., for the defendant, argued, that if the defendant in his justification shows that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment shall be given for him. To prove which he cited *Weaver v. Ward*;<sup>1</sup> Mo. 864, pl. 1192; 2 Roll. Abr. 548; 1 Brownl. Prec. 188.

*Northey*, for the plaintiff, said, that in all these cases the defendant confessed a battery, which he afterwards justified; but in this case he justified a battery, which is no battery. Of which opinion was the whole court; for if I ride upon a horse, and J. S. whips the horse, so that he runs away with me and runs over any other person, he who whipped the horse is guilty of the battery, and not me. But if I by spurring was the cause of such accident, then I am guilty. In the same manner, if A. takes the hand of B. and with it strikes C., A. is the trespasser, and not B. And, *per Curiam*, the defendant might have given this justification in evidence, upon the general issue pleaded. And therefore judgment was given for the plaintiff.<sup>2</sup>

## MONTGOMERY v. RICHARDSON AND OTHERS.

AT NISI PRIUS, CORAM LORD TENTEDEN, C. J., JUNE 22, 1832.

[Reported in 5 Carrington &amp; Payne, 247.]

FALSE imprisonment. Pleas: the general issue; and several special pleas, which were holden bad on demurrer.

*Wyborn*, for the plaintiff, proposed to read one of the special pleas which stated the fact of the suing out of the writ by one of the defend-

<sup>1</sup> Hob. 344.<sup>2</sup> *Christopherson v. Bare*, 11 Q. B. 478, *accord.* — ED.*Curia*

omit.  
See for conflict  
of authority  
in plea to  
writ. 186 n. 2.  
of statements  
as to in

Trespass, Assault & Battery.

Plea: that the horse ran over Plf. against will of Def. & that horse was beyond Def's control.

Demurrer: that even the Def. justifies a battery which is no battery & hence the plea is bad since it should have been general issue. The evidence would have been admissible there. Held by court accordingly, that plea was bad.

Not guilty in trespass denies the act declared on as a trespass in the declaration.

Then the act was not Def's act since his part in act was entirely involuntary.

Intent or negligence on part of Def. is not a necessary allegation in the declaration.

False Imprisonment:-

Plea. 1. Guilt Issue, 2. Special Pleas.

The special Pleas were held bad on Demurrer. Under the trial of Guilt Issue the attorney wanted to read one of the special Pleas in evidence. Held that it was not allowable.



There can be no damages on Special Plea until Ptf. has recovered on the Gen'l Issue.

The special pleas were decided for Ptf. & he was entitled to damages on these if he recovered on the general issue.

#### Trespass; Assault & Battery.

Plea: Self defense & if any hurt & it was occasioned by assault of Ptf. or Df.

Demurred to words "if any" & contending that they do not sufficiently confess & avoid.

Held that since they refer to the hurt the Df. received & not to the assault itself they do confess and avoid.

Then let. did not require an express Confession. — What was not denied was confessed — C.L. Prin.

Words "if any" in order to be objectionable as being implied guilt issue, must be diminishing the

ants. He contended that he was entitled to have the special pleas read, as the jury were to assess the damages upon them as well as give a verdict on the general issue.

LORD TENTERDEN, C. J. Taking this as a general question, it would be contrary to all the practice in my experience, and I believe in that of every gentleman at the bar, to hold that the statements in a special plea may be evidence under the general issue. Then, as to the particular reason given, *Mr. Wyborn* contends, that, because the jury are to assess the damages on the special plea, therefore he is entitled to read that plea. I am clearly of opinion that he is not, because there can be no damages on the special plea until the plaintiff has proved his case on the general issue. Now, this he has not done, as he has not proved that the defendant sued out the writ. *Nonsuit.*

*Wyborn*, for the plaintiff.

*Hutchinson*, for the defendant.

In the ensuing term, *Wyborn* applied to the court to set aside the nonsuit; but the court refused a rule.<sup>1</sup>

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### WISE v. HODSOLL.

IN THE KING'S BENCH, APRIL 28, 1840.

[Reported in 11 *Adolphus & Ellis*, 816.]

TRESPASS for assaulting and beating plaintiff.

Second plea. And for a further plea in this behalf the defendant says that, just before the said time when, &c., to wit, on the day and year in the declaration mentioned, the plaintiff with force and arms assaulted him the defendant, and would then have beat, bruised, and ill treated him, if he had not immediately defended himself against the plaintiff; wherefore he the defendant did then defend himself against the plaintiff as he the defendant lawfully might for the cause aforesaid; and the defendant further says that, if any hurt or damage then happened or was occasioned to the plaintiff, the same happened and was occasioned by the said assault of him the plaintiff upon him the

<sup>1</sup> *Harrington v. Macmorris*, 5 Taunt. 228; *Firmin v. Crucifix*, 5 C. & P. 98; *Wright v. Lindsay*, 20 Ala. 428; *Wheeler v. Robb*, 1 Blackf. 830; *Arnold v. Sturges*, 5 Blackf. 256; *Ricket v. Stanley*, 6 Blackf. 169; *Grash v. Sater*, 6 Iowa, 801; *Nye v. Spencer*, 41 Me. 272; *Doss v. Jones*, 6 Miss. 158; *Cilley v. Jenness*, 2 N. H. 89 (*semble*); *Whitaker v. Freeman*, 1 Dev. 271, *accord*; *Jackson v. Stetson*, 15 Mass. 48; *Alderman v. French*, 1 Pick. 1, *contra*. Conf. *Matthews v. Beach*, 4 Seld. 178; *Hix v. Drury*, 5 Pick. 303. — Ed.

defendant, and in the necessary defence of himself the defendant against the plaintiff. And this, &c. Verification.

Demurrer, assigning for causes that the plea does not sufficiently confess and admit the assaulting and beating of plaintiff by defendant in manner and form as alleged in the declaration; that the plea contains no confession of any assault or battery of plaintiff by defendant; that the allegation in the plea, that defendant did at the same time when, &c., defend himself against plaintiff, is no confession of any assault or beating of plaintiff by defendant, nor is it to be implied that such alleged defending, &c., was an active and not a passive defence; that the plea should have admitted that the said alleged defence of himself by defendant consisted of and was the alleged assault and beating in the declaration mentioned; and that it is alleged in the plea that, if any hurt or damage then happened or was occasioned to plaintiff, the same happened or was occasioned by the said assault of plaintiff upon defendant, and in the necessary defence, &c., which is an evasive and insufficient confession of any hurt or damage having been occasioned to the plaintiff by the said assault and beating. Joinder in demurrer.

*Miller*, for the plaintiff. This plea fails in the same manner as that which was held bad in *The Earl of Manchester v. Vale*; it attempts to justify, but does not confess, and therefore amounts to the general issue. "The time when," &c., there, was not considered as implying an admission. [COLERIDGE J. The plea there was very different.] This plea does not show that the defendant used any active means of defence. The averment, that, if any damage happened to plaintiff, the same happened by plaintiff's assault on defendant, might mean that the plaintiff hurt himself in assaulting the defendant; and the hypothetical admission, "if any," &c., was held insufficient in *Gould v. Lasbury and Margetts v. Bays*.<sup>1</sup> [LORD DENMAN, C. J. Here the words are, "if any hurt or damage happened to the plaintiff," not, "if the defendant assaulted the plaintiff." LITTLEDALE, J. In *Lowe v. King*<sup>2</sup> and *Greene v. Jones*<sup>3</sup> this form was used, and no objection taken, though the declaration was demurred to in each case.] In the first of those cases the commencement of the plea of *son assault domesne* stated it to be pleaded "as to the assaulting, beating," &c.; and in the latter case the commencement was to the same effect. [PATERSON, J. The commencement of this plea, "and for a further plea in this behalf,"<sup>4</sup> &c., refers to the whole declaration.]

*Platt*, contra, was stopped by the court.

<sup>1</sup> 4 A. & E. 489.

<sup>2</sup> 1 Saund. 76.

<sup>3</sup> 1 Saund. 295 c.

<sup>4</sup> The first plea (not stated in the paper book) was not guilty.

act denied by guilt issues & not  
some other act or circumstances.  
Pleading in trespass perhaps as simple  
as in any of the forms of action.

Trove pleading perhaps never properly worked out under C. L. forms.

Declar. Pltf.' possession, his loss of goods, & they came into hands of Deft. who had converted them to his own use.

Pltf. must have possession or right to possession & then must be conversion.

Trove for certain goods.

Plea that goods were pledged to Deft. for payment of a certain debt by Pltf. That has not been paid nor an offer to pay made. That on demand Deft. refused to give up the goods as he well might.

Decisions - Joined.

Held that the plea is bad as being an argumentative denial of Pltf.' right to possession, which is essential in Trove, & hence the facts set forth should have been given in evidence under the general issue of not possessed.

Here Ct. said you could go into whole matter of right of possession under not possessed.

LORD DENMAN C. J. We think the assault and battery are sufficiently confessed.

LITLEDALE, PATTESON, and COLERIDGE, JJ., concurred.

*Judgment for defendant.*<sup>1</sup>

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*In Excuse — (continued).*

(d) TROVER.

DORRINGTON v. CARTER.

IN THE EXCHEQUER, MICHAELMAS TERM, 1847.

[Reported in 1 Exchequer Reports, 566.]

TROVER for certain goods and chattels. Plea, that heretofore and before the said time when, &c., and whilst he the plaintiff was possessed of the said goods and chattels in the declaration mentioned, to wit, on the day and year in the declaration mentioned, a large sum of money, to wit, the sum of £10 3s., was due and owing from the plaintiff to the defendant for certain board and lodging theretofore supplied by the defendant to the plaintiff, and at his request, and for the carriage and conveyance of certain timber and goods theretofore carried and conveyed in divers carts and carriages by the defendant for the plaintiff, and at his request, and for certain goods and chattels theretofore sold and delivered by the defendant to the plaintiff, and at his request; and in consideration thereof, the plaintiff, being so possessed of the said goods and chattels in the declaration mentioned as aforesaid, then deposited the same with the defendant as a security for the payment by the plaintiff to the defendant for the said money so due and owing as aforesaid, and upon the terms and agreement, amongst others, that the defendant should hold and detain the same until that money had been paid by the plaintiff to the defendant. And the defendant further says, that the said debt has not been paid by the plaintiff to the defendant, nor hath the plaintiff tendered to the defendant, or offered to pay him the said amount of the said debt, but the said debt is still due, and unpaid and unsatisfied; wherefore the defendant hath continually held and detained, and still holds and detains, the said goods and chattels, for the cause in this plea aforesaid, and at the said time when, &c., did refuse to deliver up the same to the plain-

<sup>1</sup> In the course of the argument Platt referred to the precedents in Winch's, Coke's, and Lily's Entries. See Winch, 1121; Co. Ent. 644; Lil. Ent. 457.

tiff on being then required by him so to do, as the defendant lawfully might, being the said conversion in the declaration mentioned. Verification.

Special demurrer, assigning for causes, that the plea is an argumentative denial that the plaintiff was lawfully possessed of the said goods as of his own property, and that it ought to have concluded to the country, and not with a verification, and that it does not confess any conversion, and amounts to the general issue.

Joinder in demurrer.

*J. Brown*, in support of the demurrer. The plea is bad, as amounting to an argumentative denial of the plaintiff's right of possession at the time of the conversion. It is also bad as amounting to the general issue, as it does not contain any admission of an actual conversion. The plea is in substance this, — that the goods were deposited with the defendant, to be retained by him until payment of a certain debt due from the plaintiff to him, and that the debt had not been paid when the defendant refused to deliver them up, as he was justified in doing; in other words, it is a plea of lien. "Now the action of trover only lies where the plaintiff has the right to possession as well as the legal property in the suit. That was established by the case of *Gordon v. Harper*,"<sup>1</sup> as *Tindal, C. J.*, said in the case of *Owen v. Knight*. The latter of these cases is very like the present. It was an action of trover, and the Court of Common Pleas held that the defendant was entitled to give in evidence facts of a similar nature to the present, under a plea that the plaintiff was not possessed as of his own property of the goods in the declaration mentioned. This case was recognized by the Court of Queen's Bench in that of *White v. Teal*, where Lord Denman says, "He (the defendant) ought to have traversed that the plaintiff was possessed as of his own property, in manner and form as alleged in the declaration, and then he would have put in issue the plaintiff's right of possession, as was holden in *Owen v. Knight*, and would have been entitled to prove the lien in order to negative that issue." These authorities were recognized by this court in *Mason v. Farnell*.<sup>2</sup> Alderson, B., there says, in delivering the judgment of the court, "No doubt plausible reasons may be assigned for saying that the proper plea on which such a defence as a lien or the like may be made is the plea of not guilty, by which the conversion is denied." *Isaac v. Belcher*<sup>3</sup> decided that the plea of not possessed puts in issue the right of the plaintiff's possession at the time of the conversion. In the second place, *Acraman v. Cooper*<sup>4</sup> is expressly in point, that this plea does not sufficiently confess a conversion. A refusal to give up

<sup>1</sup> 7 T. R. 9.

<sup>2</sup> 12 M. & W. 674.

<sup>3</sup> 5 M. & W. 189.

<sup>4</sup> 10 M. & W. 585.





Trove by Plffs, as assignees of a bankrupt,  
for commission of certain goods.

Plea that before the bankruptcy Dept  
Obtained Judgment, issued execution, &  
sold the goods, which is the said com-  
mission.

Held that the plea is bad as a-  
mounting to denial of commission  
(the Ct. holding that Commission nec-  
essarily means wrongful commis-  
sion) & that therefore the general  
issue should have been pleaded.

~~The idea of what not quite brings into  
issue in law is certainly more~~

Correct

the goods on the ground of a lien does not amount to a conversion. A demand and refusal are only evidence of it; and it is improper to plead mere matter of evidence. He was then stopped by the court.

*Ring*, contra, contended that the matter set up in the plea, being a license to retain the goods upon the terms of a special agreement, might be specially pleaded, as it gave the plaintiff the advantage of knowing what the precise defence was which the defendant intended to rely upon at the trial.

*Per Curiam*.<sup>1</sup> We are all of opinion that the plea is bad, as amounting to an argumentative denial of the plaintiff's right of possession of the goods in question at the time of the conversion. The plea sets up a lien. That is inconsistent with the plaintiff's lawful possession, as was held in the case of *Owen v. Knight*, in the Court of Common Pleas, with which decision we entirely concur. The argument, therefore, being well founded upon that point which is raised by the special demurrer, that it is an argumentative denial of the plaintiff's lawful possession at the time of the conversion, it is not necessary to give any opinion upon the other point. There must therefore be judgment for the plaintiff.

*Judgment for the plaintiff.*<sup>2</sup>

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YOUNG v. COOPER.

IN THE EXCHEQUER, FEBRUARY 14, 1851.

[Reported in 6 *Exchequer Reports*, 259.]

TROVER by the plaintiffs, as assignees of one T. Robinson, a bankrupt, for the conversion of certain goods and chattels of which Robinson was possessed before his bankruptcy. Plea (*inter alia*), that Robinson, before he became bankrupt, was indebted to the defendant in £400; that the defendant recovered judgment in an action brought against him in this court for the sum of £400, with £8 10s. costs, upon which the defendant issued execution; and that, before the bankruptcy, the sheriff, at the request of the defendant, for the purpose of executing the writ of execution, seized and took in execution the goods in the declaration mentioned, and, before the bankruptcy, sold the said goods, for the purpose of satisfying, &c., for a certain sum, which was paid over to the defendant in part satisfaction, &c.; which said seizure and sale of the said goods and chattels is the conversion in the declaration mentioned. Verification.

<sup>1</sup> Parke, B., Alderson, B., Rolfe, B., and Platt, B.

<sup>2</sup> See *Jackson v. Cummins*, 5 M. & W. 849.—Ed.

Special demurrer, on the grounds that the plea was an argumentative denial of the causes of action in the declaration, and amounted to an argumentative denial of the conversion, and therefore to not guilty; that it was ambiguous, for that if it was to be taken as sufficiently confessing a conversion, it did not and could not justify it, as every conversion is a wrongful act and cannot be justified; and if it did not confess a wrongful conversion, it was bad for not admitting the cause of action.

Joinder in demurrer.

*Hugh Hill*, in support of the demurrer. The plea is bad, for the reasons assigned on special demurrer. There can be no doubt that, according to the old authorities, the plea would have been bad before the New Rules. Thus it is laid down in *Bac. Abr. Trover* (F. 2): "The defendant in an action of trover cannot justify, because the conversion must be confessed by a plea of justification; but the conversion is the tortious act, and therefore cannot be justified." So, in *Com. Dig. Action upon the Case upon Trover* (G. 6): "In trover, the defendant can plead nothing but not guilty or a release." The same law is to be found in the following cases: *Agar v. Lisle*,<sup>1</sup> *Ascue v. Sanderson*,<sup>2</sup> and *Hartford v. Jones*.<sup>3</sup> These authorities sufficiently show the law upon this subject before the New Rules of Hilary term, 4 Will. IV. Now these rules have not altered the effect of the plea of not guilty. It now operates as a denial of the conversion. But the mere fact of a seizure and sale of goods is not *per se* a conversion. The act must be tortious; as, for instance, a mere refusal to deliver up goods is not necessarily a conversion, though it may be evidence of it. The plea, therefore, operates as a denial of the wrongful act. There is no doubt that, shortly after the introduction of those rules, the courts were of opinion that the mere fact of the conversion was in issue under not guilty. Upon this ground *Stancliffe v. Hardwick*<sup>4</sup> was decided; and was followed by *Vernon v. Shipton*<sup>5</sup> and *Weeding v. Aldrich*,<sup>6</sup> although *Littledale, J.*, in the latter case, entertained doubts upon the question. But, from the more recent authorities, it is now clear that the legality of the act is put in issue by the plea. In *Whitmore v. Green*,<sup>7</sup> Parke, B., says, "We came to an erroneous conclusion in the case of *Stancliffe v. Hardwick*, that the New Rules have made any difference as to the meaning of a conversion;" and *Alderson, B.*, says: "Not guilty and not possessed together make up the old not guilty; and whatever might be given in evidence under not guilty

<sup>1</sup> Hob. 187.

<sup>2</sup> 1 Ld. Raym. 898.

<sup>3</sup> 2 M. & W. 9.

<sup>4</sup> 18 M. & W. 107.

<sup>5</sup> Cro. Eliz. 483.

<sup>6</sup> 2 C., M. & R. 1.

<sup>7</sup> 9 A. & E. 861.

If this theory had been carried to its logical extent there would be no other plea in trav. except not guilty.

True possession is sufficient to maintain trav.

To say that not guilty puts into issue the wrongful conversion brings in the wrongfulness which is an issue of law.

{ On principle not guilty should deny the act which was prima facie conversion.

Ptff. may bring trav. on right of possession or possession either. Not possessed at. Law either party to put in evidence actual possession or right of possession, and right of possession is superior to actual possession.

Th From:

If you had not had anything to do with goods you pleaded not guilty.

If you had; not possessed

Only Confession & Avoidance  
when in discharge.

Practical outcome of pleading.

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\* We would say that not guilty denies only act which is *prima facie* a conversion & that under it you could not show that act was justifiable, but Ct held that it denied wrongful conversion, or wrongfulness of conversion.

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Pleading in trespass far better.

before the New Rules, may be proved under one or the other of them." [PARKE, B. My brother Maule, in his argument in *Tripp v. Armitage*,<sup>1</sup> convinced me that we had come to an erroneous conclusion in *Stancliffe v. Hardwick*.] *Kynaston v. Crouch*<sup>2</sup> is to the same effect; and the observations of Coltman, J., and Williams, J., in *Mayhew v. Herrick*,<sup>3</sup> are of a similar character. If this plea be taken to be a plea in confession and avoidance, it does not confess any cause of action.

*Crompton*, contra. The defendant could not safely rely upon the plea of not guilty alone, for he might be unable to give his present defence in evidence under it. There is no doubt that formerly this defence might well have been pleaded specially; and *a fortiori*, since the New Rules, the defendant is entitled so to plead it. There is no distinction between the action of trover and any other action on the case; and the rule which is to govern the same class of actions ought to be uniform. In an action for the diversion of a watercourse, the plea operates only as a denial of the diversion. [PARKE, B. This plea in truth amounts to an argumentative denial of the conversion. By the New Rules, "In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant." In the case of the diversion of a watercourse, the diversion only is denied by the plea. Then the rule goes on to exemplify the distinction between that action and the action of trover: "In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods." Then the simple question is, whether by the conversion is meant a conversion in point of fact, or a wrongful conversion. In *Stancliffe v. Hardwick*, we held that a conversion in fact was put in issue by the plea; but we have since come to the conclusion that our opinion in that case was erroneous.

A conversion, *ex vi termini*, means a wrongful conversion.] In *Samuel v. Duke*,<sup>4</sup> which was an action of trover against the sheriff, to which the defendant pleaded not guilty and not possessed, Parke, B., said, "If the conversion had been the sale of the goods, then the sheriff must have previously seized; and probably it would have been competent to him, under the denial of the plaintiff's right of possession, to show that, at the time of the sale of the goods, the plaintiff had no possessory right, but that the sheriff had the right to seize them. But the case is different if the conversion complained of be

<sup>1</sup> 4 M. & W. 687.<sup>2</sup> 14 M. & W. 266.<sup>3</sup> 7 C. B. 229.<sup>4</sup> 8 M. & W. 622.

the act of seizure. I entertain a strong opinion that, under these pleadings, it was not competent to the sheriff to enter into this defence at all." That would seem a strong authority in the defendant's favor.

PARKE, B. I think that the plea is bad. We must abide by our amended view of the law, which we adopted since the case of Stancliffe v. Hardwick. We have, since that decision, come to the conclusion that the term "conversion," used in the rule in question, means a wrongful conversion. The rule says that the plea of not guilty shall operate as a denial of the conversion only, and not of the plaintiff's title. It then goes on to direct that all matters in confession and avoidance shall be specially pleaded, *i.e.*, such matters as can be properly pleaded as such. But, according to the preceding view of this rule, the present plea does not set up such a defence. The plea therefore cannot be supported, and the plaintiffs are entitled to judgment.

ALDERSON, B., PLATT, B., and MARTIN, B., concurred.

*Judgment for the plaintiffs*<sup>1</sup>

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*In Excuse — (continued).*

(c) DETINUE.

CLEMENTS v. FLIGHT.

IN THE EXCHEQUER, NOVEMBER 18, 1846.

[Reported in 8 *Law Times*, 166.<sup>2</sup>]

THIS was an action of detinue brought against the defendant for the recovery of certain papers and scrip certificates which, it appeared, had been left with the defendant by way of security or pledge for money advanced; the defendant had pleaded to the action a plea of tender, and the plaintiff had specially demurred to that plea, because it was an argumentative ~~plea~~ *plea* of *non detinet*; that it was double; and, also, that it was in bar to the damages only.

*Lush*, in support of the demurrer. The detention complained of is

<sup>1</sup> *Wilkinson v. Whalley*, 5 M. & G. 590; *Whitmore v. Greens*, 18 M. & W. 104; *Kynaston v. Crouch*, 14 M. & W. 266; *Higgins v. Thomas*, 8 Q. B. 908; *Ringham v. Clements*, 12 Q. B. 260; *Mayhew v. Herrick*, 7 C. B. 229, *accord*; *Stancliffe v. Hardwick*, 2 C., M. & R. 1; *Vernon v. Shipton*, 2 M. & W. 9; *Weeding v. Aldrich* 9 A. & E. 861, *contra*. — Ed.

<sup>2</sup> s. c. 16 M. & W. 42. — Ed.

Detention for certain papers left with Deft.  
by way of pledge. Plea a tender of the  
same. Demures special that the plea  
amounted to non detinet. Joinder.  
Held that plea was bad as amount-  
ing to non detinet for detention  
does not mean mere possession nor  
even a failure to tender & offer the  
goods to Plt. but an adverse de-  
tention by Deft. & hence this is  
not conferred by a plea of tender.



Gift of action in Detainer is the  
detaining & not the Taking.

Typical case.

A bails goods to B & B under-  
lined on request, A requests  
goods & B refuses to deliver.

Detainer lies for wrong  
retaining. —

Declaration: —

Sometimes drawn in Special  
Billment &c.

Sometimes a fiction find-  
ing &c.

Non detinet means: —

1. Non had property.
2. Tendered it & so non  
detained it.

A tender after a previous  
refusal does not destroy  
the action on the previous  
detainer by refusal &c.

as it should be at the time when the writ was issued, but the plea in the present case only shows that they were held before, and does not confess what is charged in the declaration; detainee may, in that case, be brought after a redelivery. He was not aware of any plea of this description in detainee. [PARKER, B. Yes. You will find one in Brown's Entries, 129, and in Brooke's Abridgment also, pl. 28.] There was no averment here of readiness and willingness.

*Hoggins*, contra (*Patterson* with him). This plea is good. The question is, is it a bailment, or is it a taking? We say the goods came into our hands as a pledge; when you discharge that you shall have them. And, if it be discharged, the plaintiff should make a demand; he is not bound to say he was always ready and willing to deliver. *Giles v. Hart*.<sup>1</sup> The defendant has to cover, by his plea, the whole time whilst the goods were in his possession, and he does so accordingly, by saying, as to the first part of the time, it was there as and by way of a pledge, and as to the remaining portion, that he tendered the documents in question to the defendant, but he refused to receive them; the ~~Defendant's~~ <sup>Plaintiff's</sup> duty is not always to be ready and willing after a tender, and there is no obligation on his part, after receiving the money and tendering the articles, to go further. *Whitehead v. Harrison*.<sup>2</sup> [The court said it all turns upon the word "detain;" it is an excuse for ~~not~~ detaining.]

*Lush*, in reply. It imports something further; it is a withholding as well as a detaining; and referred to Fitzherbert, N. B. 198; *Isaac v. Clarke*; <sup>3</sup> *Dirks v. Richards*.<sup>4</sup> It amounts to the general issue of *non detinet*.

The court, after taking time to consider, now (November 21) delivered their judgment.

POLLOCK, C. B. The case of *Clements v. Flight*, argued by *Mr. Lush* on one side, and *Mr. Hoggins* on the other, a few days ago, was an action on a bailment. The declaration disclosed a special bailment, with an averment that the defendant was, after the repayment of a certain sum of money, to redeliver the goods on request. It was averred the money was repaid, the request was made, and the goods were not redelivered. The second plea introduced a different bailment, namely, a bailment not of all the goods for the entire sum, but as to a part of the goods it referred the bailment to a part of the sum, and then it averred that part of the sum was repaid, and that there was a tender to redeliver the goods, which the plaintiff declined to accept. To this there was a special demurrer. The first ground of special demurrer, which is the only one which we have noticed in the

<sup>1</sup> 2 Salkeld, 622; Bacon's Abridgment, title Tender, letter P; Story on Bailments, 229, §§ 389 and 376.

<sup>2</sup> 6 Q. B. 428.

<sup>3</sup> 2 Bulstrode, 307.

<sup>4</sup> 1 Car. & Mats. 623.

judgment of the court, is that the plea amounted to an argumentative denial of the detention.

The principal point argued in this case was, whether the plea amounted to and was an argumentative plea of *non detinet*, that being the first cause of special demurrer assigned. The court intimated its opinion that this question turned on the meaning of the word "detain" in the declaration in detinue. If its meaning be that the defendant has the goods in his possession, the plea admits the detention. If it mean that the defendant has omitted to deliver, in the sense of taking the goods to the plaintiff and giving them up to him, the plea admits the detention, and excuses it. If it mean that the defendant withholds the goods, and prevents the plaintiff from having the possession of them, the plea denies the detention argumentatively, and is bad. We are satisfied that the last is the true meaning of the word "detain."

If it meant the mere keeping a possession, not adverse, how could such a possession form the ground of an action? If it meant that the defendant had omitted, and still omitted, to be active in bringing the goods to the plaintiff, the action could not be maintained, without showing an obligation by contract to do so. We have no doubt, therefore, that the detention complained of is an adverse detention. And this is the meaning ascribed to the word in Bulstrode, 308 (cited by Mr. Lush), by Haughton, J., who says, that request and refusal, "*contradixit et adhuc contradixit*," is the point in an action of detinue, but not in trover, in which conversion is the point, and request and refusal evidence only. We think, therefore, that the plea is bad, as amounting to *non detinet*. A doubt was raised by the precedents stating a readiness to deliver: Brown's Entries, 149, tit. *Touts temps prist*, p. 28; but we think the answer is, that in ancient times pleas were not so often the subject of objection for argumentativeness; and there is no case cited where a plea of readiness to deliver has been held good on demurrer.

In the course of the argument, it was suggested that the plea was bad, as containing an argumentative denial of the special bailment in the declaration. On reference to the late case of *Whitehead v. Harrison*,<sup>1</sup> and the authorities there referred to, and particularly *Gledstane v. Hewitt*,<sup>2</sup> and Brooke's Abr. tit. *Detinue de biens*, pl. 50, it seems that not only the common bailment, but any special bailment laid in a declaration of detinue, is merely surplusage, and not traversable, the gist of the action being the detainer of the plaintiff's goods, which the defendant must answer. The plea, therefore, was not open to this objection; and the omission to assign this cause of special demurrer was proper.

*Judgment for the plaintiff.*<sup>3</sup>

<sup>1</sup> 6 Q. B. 423.

<sup>2</sup> 1 C. & J. 565; 1 Tyr. 4.

<sup>3</sup> *Anderson v. Smith*, 29 L. J. Ex. 480, *accord*. — Ed.

But ex held plea bad on  
 ground that it was an  
 argumentative denial of detention  
 & amounted to non detinet.

^ Unless there is an adverse  
detention detinue does not  
lie. A mere possession  
of another's goods or perhaps  
a use of them would not  
maintain detinue unless  
that detention was adverse.

### Declaration for slander.

The Amendment was that Deft. uttered  
certain words to disadvantage  
of Pltf & loss to it.

Plea: that another person one Woor  
told ~~Pltf.~~ the Deft. the facts & he  
merely repeated them.

### Demurred.

Held, that plea is bad. The declara-  
tion by law is an amendment  
that Deft. made an unquali-  
fied declaration as stated, the  
plea does not confess this but  
shows a qualified declaration  
therefore should have been general  
issue.

Plea here may mean two things:

1. Pltf. did not state words in declara-  
tion but that he said "Woor told  
him words to it. Express Confes-  
sion after denial is of no avail.  
Express words of Confession are  
of no avail one way or another.
2. I said words but also said that  
Woor said same thing. Then it  
is bad in substance.

Def. & held plea bad in

*In Excuse — (continued).*

(f) CASE.

## McPHERSON v. DANIELS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1829.

[Reported in 10 *Barnesall & Cresswell*, 268.]

DECLARATION for slander stated that the plaintiff, before the time of the committing of the grievances thereafter mentioned, and from thence had been and still was a coach proprietor, and sold and disposed of cattle for divers persons for commission, and that he had never been suspected to be insolvent, or unable or unwilling to pay his just debts; that defendant contriving and wickedly and maliciously intending to injure the plaintiff, and to cause it to be suspected and believed by his neighbors that the plaintiff was poor, and in indigent and bad circumstances, and incapable of paying his just debts, and debts to be by him contracted, and thereby to injure him in his trade and business, falsely and maliciously spoke and published in the hearing and presence of divers good and worthy subjects of this realm of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, the false, scandalous, malicious, and defamatory words following, that is to say, "His (meaning the said plaintiff's) horses have been seized from the coach (meaning the said plaintiff's coach) on the road; he (meaning the said plaintiff) has been arrested, and the bailiffs are in his (meaning the said plaintiff's) house;" thereby then and there meaning and intending that the said plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. By means of the committing of which said grievances by the defendant, he the plaintiff was greatly injured in his good name, &c.; and also by means of the premises, one Morrison, who before the committing of the said grievances was about to send, and otherwise would have sent divers, to wit, eleven, head of cattle to the plaintiff, for the purpose of being sold and disposed of by the plaintiff for Morrison for commission and reward payable to the plaintiff in that behalf, to wit, on the day and year aforesaid, wholly refused and declined so to do, and thereby the plaintiff lost and was deprived of the commission which would have been payable by Morrison to the plaintiff. Plea, that before the speaking and publishing of the several words in the declaration mentioned, and therein supposed to have been spoken and published by the said defendant, of and concerning the said plaintiff, and of and

concerning and relating to him in his trade or business of a coach proprietor, to wit, on, &c., at, &c., one T. W. Woor, of Swaffham, in the county of Norfolk, spoke and published the following words to the defendant of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, that is to say, "His (meaning the said plaintiff's) horses have been seized from the coach (meaning the plaintiff's coach) on the road; he has been arrested, and the bailiffs are in his house;" thereby then and there meaning that the plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. And the defendant further saith, that at the time of speaking and publishing the said several words in the declaration as therein mentioned, he the defendant also declared, in the presence and hearing of the same persons in whose presence and hearing the said words were so spoken by him the defendant, that he had heard and been told the same from and by the said T. W. Woor, of Swaffham, in the county of Norfolk; wherefore he the defendant, at the said time when, &c., in the said declaration mentioned, did speak and publish of and concerning the plaintiff the said several words in the said declaration mentioned, as he lawfully might for the cause aforesaid. General demurrer and joinder. The court called upon

*Platt*, to support the plea.<sup>1</sup>

*F. Kelly*, contra, was stopped by the court.

BAYLEY, J. It seems to me that the plea is bad. The charge in the declaration is, that the defendant falsely and maliciously spoke and published in the hearing and presence of other persons of and concerning the plaintiff, and of and concerning him in his trade or business of a coach proprietor, the false and malicious words: "His horses have been seized from the coach on the road; he has been arrested, and the bailiffs are in his house;" thereby meaning and intending that the plaintiff was in bad circumstances, and incapable of paying his just debts. Now that imports an unqualified assertion to have been made by the defendant; and, if he had pleaded the general issue only, it would have been incumbent on the plaintiff to have proved, at the trial, an unqualified assertion made by the defendant to that effect: and if, instead of proving an unqualified assertion by the defendant, the plaintiff had proved only that the defendant had said that Woor had told him that the plaintiff had been arrested, &c., the defendant would have been entitled to a verdict or nonsuit. Here the defendant has pleaded specially. He was bound, therefore, according to the first principles of pleading, to confess the charge he professed

<sup>1</sup> Only so much of the case is given as relates to the question of color. — Ed.

Case:-

Arose from Westminster II — 1285.

Writs not classified in other divisions.  
were trespass on the case.

In case the declaration had  
to contain more specific allegations.

Then were: 1. Allegations making  
up inducement showing Pltff's right.  
2. Allegations showing act of Deft.  
which was complained of.

In some cases right was against  
all the world then statement of in-  
ducement not necessary ordinari-  
ly.

In slander maliciousness is  
necessary in declaration but  
law always implies malice.

In cases of privilege malice  
is sometimes necessary to  
overthrow privilege & then  
must be proved.



Care - Damage consequential, act direct  
Negligence - Act direct - Damage direct.

Negligence must be alleged either specifically or inferred by law.

2

### Case for malicious indictment.

Pleas: 1. Not guilty 2. That there was reasonable & probable cause for the indictment setting forth such cause. Held, on a rule nisi to strike out second plea, that the plea was useless as not guilty put in issue the wrongfulness of the act which is really the gist of the action. Hence reasonable & probable cause could be shown under not guilty. Rule made absolute.

To recover for malicious prosecution there must be proven prosecution without reasonable & probable cause, maliciously, & that the prosecution ended in the Pltff's favor.

to answer, and then to aver some matter as an answer. The charge is, that the defendant made an unqualified assertion that the plaintiff had been arrested, &c. Unless the plea, therefore, contain an admission by the defendant that he spoke words having that unqualified sense, it is bad. The plea does not admit that the defendant spoke the words in an unqualified sense. It is therefore bad, because it does not confess the charge stated in the declaration.

*not bad on  
guilt dem.*

LITLEDALE, J. For the reasons already given by my brother Bayley, I think that the plea is bad.

PARKER, J. This plea is bad for two reasons. To be a good plea, it must confess and avoid the cause of action stated in the declaration. But this plea either does not confess, or if it confesses, does not avoid, that cause of action. It appears from the case of *Bell v. Byrne*,<sup>1</sup> that if a defendant has not made an assertion as his own, but has merely alleged that some other person had made it, it must be so averred; and that an averment in a declaration that the defendant used slanderous words, must be taken to mean, that he used them as his own words, and as a substantive allegation of his own, and will not be supported by proof that he used them as the words of another person. To apply the principle of that decision to the present case, if the plea be understood to confess that the words were spoken as those of another person, and not as a direct assertion of the defendant himself, it does not properly confess the matter stated in the declaration; if, on the other hand, the plea be considered as confessing the words to have been used as those of the defendant himself, making a substantive allegation of his own, it does not contain any proper avoidance of the matter so confessed: for if one make such assertion of a slander as his own, it can be no answer, even admitting the latter part of the fourth resolution in Lord Northampton's Case to be law, if in the same conversation he add that some one else has also said the same thing.

*Judgment for plaintiff.<sup>2</sup>*

# COTTON v. BROWNE.

IN THE KING'S BENCH, MAY 13, 1835.

[Reported in 3 Adolphus & Ellis, 812.]

CASE for maliciously indicting the plaintiff for a conspiracy. The defendant pleaded, first, not guilty; and, secondly, as follows: "And

<sup>1</sup> 13 East, 564.

<sup>2</sup> *Davis v. Mathews*, 2 Ohio, 897, accord. See *Lucan v. Smith*, 1 H. & N. 481 — Ed.

for a further plea, &c., the said defendant says that, although true it is that he caused the said plaintiff to be indicted, as he the said plaintiff above in his said declaration has alleged, yet that he the said defendant did so for reasonable and probable cause, and without malice; for the said defendant says that, before the preferring of the said indictment, to wit, on," &c.; the plea then went into a very long statement, for the purpose of showing that the defendant had reasonable cause for the prosecution. In this term a rule *nisi* was obtained for striking out the second plea, or so much thereof as the court should direct.

*Archbold* now showed cause. Before the New Rules, Hil. 4 W. IV.,<sup>1</sup> the matter of the second plea might have been proved under the general issue; but it might also have been specially pleaded. *Pain v. Rochester*.<sup>2</sup> The New Rules not only do not prevent, but compel its being specially pleaded. In *Frankum v. The Earl of Falmouth* it was held that a defendant could not, under a plea of the general issue, deny that the act was wrongfully done. [PATTERSON, J. There the attempt was, under the word "wrongfully," in an action on the case for diverting water, to bring into question the plaintiff's right of possession.] The examples given under the head Pleadings in Particular Actions, IV.,<sup>3</sup> to illustrate the operation of the plea of not guilty, show that that plea denies the act only, and not the matter which makes it wrongful. In the instance of slander there referred to, the uttering of the words is, in itself, *prima facie* a malicious act; yet, even before the New Rules, it was not sufficient to deny the speaking, as alleged in the declaration, if the defendant meant to justify it.<sup>4</sup> Here the plea of not guilty, if it had the operation contended for on the other side, would put in issue not merely the preferring of the indictment, and wrongfully, but the preferring it without reasonable and probable cause. This would be contrary to the intention of the New Rules, which is, that the plaintiff should be always apprised of the defence intended to be set up.

*E. V. Williams*, contra, was stopped by the court.

LORD DENMAN, C. J. I am of opinion that it was unnecessary for the defendant to plead in denial of the want of probable cause. The injury complained of in this action is not merely in the indicting, nor in the indictment being wrongful, but in maliciously indicting, and in doing so without reasonable or probable cause. The plea of not guilty is sufficient.

LITTLEDALE, J., concurred.

PATTERSON, J. Some cases have been referred to, in which the

<sup>1</sup> 5 B. & Ad. i. ix.

<sup>2</sup> Cro. Eliz. 871.

<sup>3</sup> 5 B. & Ad. ix.

<sup>4</sup> But see *Fairman v. Ives*, 5 B. & Ald. 642, and the judgment of Holroyd, J. there, pp. 645, 646.

If a traverse denies the act itself it should be "not guilty" but if only the manner and form should be a specific traverse.

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No inducement necessary in malicious prosecution just as in trespass to person.

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Case:-

Declaration that Ptf. was riding in a certain carriage in a train of Dfts, that another train of Dfts <sup>by negligence of Dfts</sup> ran into train Ptf. was in, <sup>causing</sup> Ptf. serious damage.

Plea that the train Ptf. was in was not a train of Dfts, that there was negligence in part of management of that train as well as of Dfts' train. Verification.

Held that plea amounts to general issue. J. for Ptf.

This defence would not now be good even in substance.

Why contributing negl. is a defence.

1. Granting Dfts. negligent still if Ptf. negligent he can not claim of Dfts damages.

2. If Ptf. also negligent then Dfts.

plaintiff makes an assertion of right, and then complains of an injury done in respect of it; and there it is proper for the defendant to answer by denying the right. But here there is no such assertion of right; the whole matter alleged in the declaration is an act of injury.

COLERIDGE, J., concurred.

*Rule absolute for striking out the whole of the second plea.<sup>1</sup>*

BRIDGE v. THE GRAND JUNCTION RAILWAY CO.

IN THE EXCHEQUER, HILARY TERM, 1838.

[Reported in 3 Meeson & Welsby, 244.]

. CASE. The declaration stated that, before and at the time of the committing of the grievances thereafter mentioned, to wit, on the 9th September, 1837, the plaintiff was a passenger by a certain carriage forming part of a certain train of railway carriages then being on a journey on and by a certain railway, to wit, the Liverpool and Manchester Railway; and the said company was also then possessed of a certain other train of railway carriages then also journeying on and by the said railway, under the care and management of certain servants of the said company: nevertheless, the said company, by their said servants, so carelessly, negligently, and improperly behaved and conducted themselves in and about the management, control, and direction of the said train of the said company, that the same, by and through the default, carelessness, negligence, and improper conduct of the said servants of the said company, then with great force and violence ran upon and against the said train of carriages, in one whereof the plaintiff then was being carried as aforesaid, and struck against the same, by means whereof the said last-mentioned train was very much injured, and the said carriage on which the plaintiff then was driven in, broken to pieces, and destroyed, and thereby three of his the plaintiff's ribs were fractured and broken, and he was otherwise greatly wounded, bruised, and injured, &c.

Plea, that, before and at the time of committing the grievances in the declaration alleged, the said train of carriages, in one whereof the plaintiff was a passenger, did not belong to the defendants, nor was same under the care and management of the defendants or of their servants, but under the care and management of other persons; that

<sup>1</sup> Rowe v. Ames, 6 M. & W. 747, accord. — Ed.

*Hounsfield v. Drury, 11 A.S. 98, acc.:*

before and at the time when, &c., in the declaration mentioned, the said train of railway carriages of the defendants was lawfully proceeding on the said railway, and that the persons who had the management, control, and direction of the said train of carriages in one whereof the plaintiff was then being carried, carelessly, negligently, and improperly behaved and conducted themselves in and about the management, control, and direction of the same, and that, in part by and through the default, carelessness, and negligence, &c., of the last-mentioned persons, as well as in part by and through the default, carelessness, and negligence, &c., by or on the part of the servants of the defendants in and about the management, &c., of the said train of carriages of the defendants, the said train of carriages of the defendants ran upon and against the said train of carriages, in one whereof the plaintiff then was being carried, and struck against the same, and occasioned the damages, injuries, &c., in the declaration mentioned. Verification.

Special demurrer, assigning the following causes: that the plea amounts to not guilty; that it is argumentative, and the allegations in it are averments of evidence and not of facts; that it consists of matters of law, and not of matters of fact on which any material issue can be taken, &c. In the margin of the demurrer it was stated that the plaintiff would also argue that the plea was bad in substance.

*Cowling*, in support of the demurrer, was stopped by the court.

*Neville*, contra.<sup>1</sup> The plea is good in form, as a plea in confession and avoidance. It confesses a *prima facie* case of negligence in the defendants, but avoids it by introducing new matter, viz, that the persons who had the conduct of the carriage in which the plaintiff was were also guilty of negligence. But, further, although the facts alleged in the plea might be given in evidence under the plea of not guilty, yet, as they present a question of law for the determination of the court, it is no objection on special demurrer that the plea amounts to not guilty. The distinction is taken in several cases, that, where a question of law is raised on the face of the plea, the party may allege the matter specially, although it might have been given in evidence under the general issue. *Birch v. Wilson*;<sup>2</sup> *Chambers v. Taylor*;<sup>3</sup> *Pain v. Rochester*;<sup>4</sup> *Newton v. Creswick*.<sup>5</sup> The matter of law raised here is, whether the negligence of the parties under whose care the plaintiff was excuses the defendants' negligence.

LORD ABINGER, C. B. I think the plea is bad in substance. And,

<sup>1</sup> Only so much of the case is given as relates to the question of pleading. — Ed.

<sup>2</sup> 2 Mod. 274.

<sup>3</sup> Cro. Eliz. 900.

<sup>4</sup> Cro. Eliz. 871.

<sup>5</sup> 3 Mod. 165.

negligence did not cause the injury.

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In some jurisdictions Pltff. must prove due care. Here not guilty denies this care.

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In other states due care not necessary in declaration. Here a ~~specific~~ <sup>then</sup> ~~in~~ <sup>Excuse</sup> is necessary.

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Williston prefers care a defence.

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? Which does Mass. hold. —

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Wherever <sup>due</sup> care must be specifically proven <sup>by Pltff.</sup> it must be denied by not guilty.



Case:-

Depts common carriers; delivery to them for carriage & reception by Depts as carriers for carriage a certain parcel etc. & that it became duty of Dept to deliver it in reasonable time & which not delivered etc.

Plea that the Contract of bailment was such that if there were more than one parcel enclosed in the parcel shipped etc. the Carrier would not be liable etc. Held that it clearly amounted to ~~the General Issue~~. a denial

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In effect denied one of the several special circumstances necessary to make out the case.

in point of form, it amounts to no more than a simple negation of the negligence which makes the defendant liable.

PARKE, B. The plea undoubtedly amounts to the general issue.

BOLAND, B., concurred. *Judgment for the plaintiff.*<sup>1</sup>

CROUCH v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

IN THE EXCHEQUER, APRIL 28, 1852.

[Reported in 7 Exchequer Reports, 706.]

CASE. The first count of the declaration stated that the defendants were common carriers of goods for hire, from Liverpool to Dublin; and that the plaintiff, on, &c., caused to be delivered to the defendants, as such common carriers as aforesaid, and the defendants, as such common carriers, received a package containing divers goods, to wit, &c., to be safely and securely carried and conveyed by the defendants for the plaintiff, from London to Dublin, and at the said last-mentioned place to be delivered by the defendants for the plaintiff, within a reasonable time in that behalf; and that it thereupon became the duty of the defendants safely and securely to carry and keep the package. Breach, that the defendants did not safely and securely carry the package; but that, through their negligence, the package and its contents were lost.

*Plea denies this.*

Plea, that at the time when, &c., the defendants gave notice to the plaintiff that they would not carry any package containing several packages collected from different parties, and addressed to and intended for several different parties, although enclosed in one package and addressed to one party, unless the addresses on the enclosed packages and their contents were declared; and further, that the defendants would not be responsible for any such package or the contents, unless such declaration should be made and the particulars declared; and that the defendants carried on their business on the terms contained in the said notice; that the package enclosed three parcels, received by the plaintiff from three different parties; and the parcels were addressed to and intended for three different parties; and that the fact that the package contained such parcels was not declared to the defendants; and that the defendants received the package on the terms of the notice, which the plaintiff well knew; and that the de-

<sup>1</sup> *Dakin v. Brown*, 8 C. B. 92, *accord*. Conf. *Hutchinson v. York R.R.*, 5 Ex. 348 — Ed.

defendants never consented to subject themselves to any responsibility contrary to the terms of the said notice. Verification.

Special demurrer, assigning amongst other causes, that the plea denied argumentatively that the package was delivered to and received by the defendants as common carriers. Joinder in demurrer.

*J. Brown*, in support of the demurrer, contended that the plea clearly amounted to an argumentative traverse of the bailment as stated in the declaration; and he cited *Shaw v. York and North Midland Railway Company*,<sup>1</sup> to show that, where such an alleged bailment was traversed, and it having been proved at the trial that the chattel bailed was made subject to a condition not complied with, it was held that the allegation was not sustained; that in *Wyld v. Pickford*<sup>2</sup> the notice differed from that in the present case; and that, although the objection was taken to a plea of its being argumentative, the objection was held to be answered by the fact that the defendants there did not by the terms of their notice stipulate to carry goods of any description unless insured. He also relied upon *Austin v. Manchester, Sheffield, &c., Railway Company*,<sup>3</sup> as being in point. The court then called upon

*Atherton*, to support the plea; and he endeavored to distinguish the case from that of *Shaw v. York and North Midland Railway Company*. But

THE COURT were most clearly of opinion that the objection to the plea was good, and that the plaintiff was entitled to judgment.

*Judgment for the plaintiff.*<sup>4</sup>

<sup>1</sup> 18 Q. B. 847.

<sup>2</sup> 8 M. & W. 448.

<sup>3</sup> 20 L. J. Q. B. 440.

<sup>4</sup> *Elwell v. Grand Junction R.R. Co.*, 5 M. & W. 669, *accord.* Conf. *Wyld v. Pickford*, 8 M. & W. 448.—Ed.

*no leading point.*



Libel is a written declaration. Damage  
an immaterial allegation.

Slander. Damage must be alleged  
unless. 1. Words impute crime. 2.

Impute loathsome disease. 3. impute  
unfitness for profession or business.  
Otherwise deniable.

Real Issue does not put in issue  
the damage but only the speaking  
of words. Damage is not an act  
of Def. Legal damage must be  
made out.

Action on the case for using defam-  
atory words <sup>imputing a crime</sup> concerning P'ty. Def.  
admits the words but declares that  
"the said P'ty. is not damaged in  
maneuers & form 't." 10th to be a  
bad plea for speaking the words  
admits the damage.

Probably declaration alleged damage.

1. Damage was an immaterial allegation.

2. Damage is presumed & hence a  
matter of law.

Here the allegation or words impute  
a crime.

# CHAPTER III.

## PLEAS BY WAY OF TRAVERSE.

### SECTION I.

#### *General Requisites.*

#### RUSSELL'S CASE.

IN THE —, HILARY TERM, 1587.

[Reported in *Dyer*, 28 b, placitum 171.]

*Order.*

77  
79 *2nd.*  
78  
81.  
82.  
83.  
85.  
89, *1st.*  
89, *2nd.*

ONE Christopher Russell brought an action upon the case against a man, who comes and defends the force, &c., and as to the speaking and publishing of the aforesaid words, viz., "I will abide by it, that Christopher Russell was and is a false thief, and was at my door in the sessions-day at night between one and two of the clock after midnight, and would have robbed me, and did break open my doors, and did put me in jeopardy of my life," the said plaintiff is not damnified in manner and form, &c. And upon that plea the plaintiff demurred in law. And by the opinion of the court the plea is clearly bad, for it admits the speaking of the aforesaid words, but that the plaintiff was not damnified by that; and what damage can be more grievous than such a report of him? And they were of opinion to give judgment for the plaintiff, if the defendant pleads nothing by the Monday next ensuing, at which day, by the opinion of the whole court, a writ of inquiry of damages was awarded without any argument.<sup>1</sup>

<sup>1</sup> *Pridde v. Napper*, 11 Rep. 10; *King v. Mayor*, 5 T. R. 66; *King v. Lyme Regis*, Doug. 154; *Trower v. Chadwick*, 8 B. N. C. 834; *Summers v. Ball*, 8 M. & W. 596; *Cane v. Chapman*, 5 A. & E. 647; *Hobson v. Middleton*, 6 B. & C. 295; *Smith v. Thomas*, 2 B. N. C. 878, 879; *Reindel v. Schell*, 4 C. B. n. s. 97; *Tennessee Bank v. Armstrong*, 12 Ark. 602; *Baldwin v. Walker*, 21 Conn. 183; *Dresser v. Brooks*, 8 Barb. 438 (*semble*); *Drake v. Cockroft*, 10 How. Pr. 377; *Freeman v. Curran*, 1 Minn. 169; *Robbins v. Lincoln*, 12 Wis. 8; *Holden v. Kirby*, 21 Wis. 149, *accord.* — ED.

## SIR FRANCIS LEKE'S CASE.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1579.

[Reported in *Dyer*, 365, *placitum* 82.]

IN replevin the defendants, as bailiffs of Sir Francis Leke, knight, made cognizance of the taking of the cattle in Whitbridge-close, containing two acres of pasture for damage-feasant, as in the soil and freehold of the said Francis Leke; to which the plaintiff pleaded, that before the said time when, &c., and at the said time when, &c., he was seised in his demesne as of fee of and in one close of pasture called But-close, contiguous and adjoining to the said two acres of pasture; and that Sir Francis Leke, and all those whose estate he hath, have used from time whereto memory runneth not to enclose the said two acres of pasture sufficiently from the aforesaid close, called But-close, and by default of sufficient enclosure the cattle entered into the two acres of pasture, and depastured therein until, &c. And the defendants by protestation, denying the prescription, for replication said, that the said But-close was the soil and freehold of George Earl of Salop, without this, that the aforesaid plaintiff at the said time when, &c., was seised of But-close aforesaid in his domain as of fee, as the said plaintiff had above alleged, and this, &c. Upon which it was demurred, &c. And the opinion of the court was, that the precise estate which the plaintiff had in But-close was not traversable by the defendants if the plaintiff had not shown any estate in it, [but] generally that he was seised of it, without showing of what estate, or that it was his freehold, &c. And then the other party should be driven to say that he had nothing therein; for if he had but common, or a term of years, or at will, or only a license from the owner to put in his cattle *pro hac vice*, it is sufficient; and then the best answer to it would have been with a flat negative, *scil.*, that he had nothing in the aforesaid close at the time, &c., which is more ready pleading; for an *absque hoc* ought to be taken to a thing expressly alleged before, and is induced with a former plea, *scil.*, as he said before, or by showing a cross matter contrary to the plaintiff's plea, as here above, *scil.*, "that the But-close was the freehold of the Earl of S., *absque hoc*," &c. And at length the opinion was, that the *absque hoc*, that he was seised in fee, was a good traverse, because the plaintiff had given this advantage to his adversary in this preciseness of estate, who best knew what interest he had to put his beasts into But-close; for if he was a mere stranger and had nothing in But-close, nor common there, nor license from the

Replevin for cattle.

Pltfs as bailiffs <sup>of Leke</sup> plead that this land in which they took cattle belonged to Leke & were damage-ferous. Pltfs. reply that by prescription it was Leke's duty to keep a fence around the land & to thus separate it from Butchlose which Pltfs. held in his demesne as of fee. Deft. denied the prescription & the "Holding" in his demesne as of fee". Held that here the Pltfs. had alleged a certain right in the land Butchlose & that although in general a traverse of all right in the land would be required here the Pltfs. had given Deft. the advantage of traversing merely the right which Pltfs. had stated. Plea good.

Pltfs. made too large an allegation & part immaterial could not be separated from essential. Hence the whole statement "Seized in his demesne as of fee." Chitty, I, 252-3.

Def't's first plea in replevin is really a second declaration, called avowry or <sup>consequence</sup> ~~consequence~~. Avowry: Def't. claims goods in his own right. <sup>Consequence</sup> ~~Consequence~~: Def't.



claimers in other right as bailiff ret. Deft  
in replier, however, may plead a plea  
of non cepit. If this be the plea be  
the Deft. cannot get goods back.

Ejectment:-

Deft. claimed by copy granted 44 Elizabeth.  
Plf. claims the same by copy granted  
1st June 43 Elis. Deft. traverses the

granting <sup>1601.</sup> on 1st June 43 Elis. + it was  
held bad for to traverse a date where  
it is not material to the issue matters  
it a part of the issue + hence a mat-  
ter of substance + so the rejoinder is  
bad + not helped by 18 Elis. c. 14. (form).

When the material allegation is set-  
table from material allegation  
then Deft. must only traverse  
the material part.

Argumentation seldom a fault  
in pleading at present day.

owner, nor command, he was a trespasser to the defendant, although the enclosure was not sufficient. Wherefore, &c., but WINDHAM doubted.<sup>1</sup>

*omit*

LANE v. ALEXANDER.

IN THE KING'S BENCH, HILARY TERM, 1608.

[Reported in *Croke's James*, 202.]

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to mit; on*

EJECTMENT. The defendant entitles himself by copy granted 44 Eliz. The plaintiff, by replication, entitles himself by copy granted 1st June, 43 Eliz. The defendant maintains his bar, and traverseth *absque hoc*, that the queen, on the 1st June, in the forty-third year of her reign, granted the land by copy *modo et forma prout*, &c.

The demurrer being general, it was moved that this rejoinder was not good; for the day and year of granting the copy is not material, but only whether it were granted before the copy made to the defendant; and therefore he ought to have traversed *absque hoc*, that the queen granted *modo et forma prout*, &c.

But it was then moved, in regard it is but matter of form, and is not shown for cause, that it is aided by the statute of 18 Eliz. c. 14. *Sed non allocatur*; for the day ought not to be made material, unless the queen had granted by copy before the grant to the defendant: the traversing also of the day, where it ought not, is matter of substance; for thereby he makes it parcel of the issue, which should not be. Wherefore it was adjudged for the plaintiff.

GORAM v. SWEETING.

IN THE KING'S BENCH, MICHAELMAS TERM, 1670.

[Reported in 2 *Saunders*, 205.]

ASSUMPSIT on a policy of assurance by Goram, plaintiff, against Sweeting, defendant. The plaintiff declares that he had caused a policy of assurance to be written on the good ship called the "Margaret," of London, and on the tackle and apparel, &c., of the same ship, in which policy it was contained, that if any misfortune should happen to the ship in the voyage, it should be lawful for the plaintiff to sue and

<sup>1</sup> Cockerill v. Armstrong, Willes, 108; Tatem v. Perient, Yelv. 195; Wood v. Budden, Hob. 119; Smith v. Dixon, 7 A. & E. 1; Sutton v. Page, 8 C. B. 204; Webb v. Rose, 4 H. & N. 111, accord. Conf. Reg. v. Dendy, 22 L. J. Q. B. 247.—ED.

labor for the defence and safety of the ship, without any prejudice to the policy, and that the assurers, of whom the defendant was one, would contribute to the charges thereof according to the several sums respectively insured by them. And the plaintiff further shows that the defendant became an assurer on the said policy for £50, and in consideration of the plaintiff's promise to pay him at the rate of £3 12s. per cent for six months, undertook and promised to perform the said policy as to £50 so insured by him. And the plaintiff avers in fact that the ship, &c., did not arrive in safety, but "that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture were sunk and destroyed in the said voyage," of which the plaintiff gave the defendant notice, and abandoned all his interest therein, yet the said defendant has not borne the adventure, nor paid the said £50, wherefore the plaintiff brings this action.

The defendant pleads in bar that the ship and all the apparel and tackle aforesaid arrived in good safety, and traverses without this, that "the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture were sunk and destroyed in the said voyage in manner and form as," &c., and this, &c., wherefore, &c., upon which plea the plaintiff demurs in law.

And *Jones*, for the plaintiff, argued that the traverse in the defendant's plea was bad, because the defendant has traversed in the conjunctive, namely, without this that the said ship and tackle, &c., were sunk and destroyed, whereas it ought to be in the disjunctive, namely, without this that the said ship or tackle, &c., were sunk and destroyed. For, as he said, if in this case any of the things enumerated arrive in safety, as, for instance, if the ship arrive in safety, although all the goods and merchandises, and all the apparel and tackle of the ship, for which by the policy a satisfaction ought to be made to the plaintiff, are lost, yet if issue had been taken on the defendant's traverse as it now is, it would be found against the plaintiff; and this action being only for damages according to the loss which the plaintiff has sustained, every part ought to be put in issue. For perhaps the ship arrived in safety, and yet the other things, as guns and anchors, and all the goods and merchandises, are lost, which ought to be put in issue by themselves; so that the plaintiff may have a verdict for the loss of them, and his damages assessed according to the proportion of them, and the defendant may be acquitted of the residue. But now, unless the plaintiff prove that the ship and all the other things are lost, he shall not recover for any part. And if the defendant prove that only a cable or anchor arrived in safety, he would be acquitted of the whole, if the plaintiff had taken issue on this traverse. Wherefore he concluded that the traverse was bad, and prayed judgment for the plaintiff.

Assumpsit on a policy of insurance.  
Plff. stated policy & then averred that  
ship, tackle, apparel, ordnance and so  
forth were lost & claim the amount  
of policy 50 £. Deft. pleaded that  
ship, tackle, apparel, ordnance, and  
other things were not lost. Plff. de-  
murs on ground that Deft. should  
have pleaded, disjunctively instead  
of conjunctively, that neither ship,  
or tackle, or apparel, were lost. J. for Plff.  
Held that it was only a suit for  
damages and Deft. could aid  
himself by a writ of inquiry.

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Proper declaration in insurance  
is for all parts of property. &  
Court construes declaration as  
covering any one. see 2 Burr 904  
Deft. must plead disjunctively.

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In rebutting declaration for \$100<sup>00</sup>  
Deft. must prove that he owes  
Plff. nothing.

Deft. for an Escape.

Plef. alleged a voluntary escape.

Deft. protesting that he did not let him voluntarily escape, pleads that he took him in fresh pursuit. Demurs because Deft. did not traverse voluntary escape. T. for Deft. The escape being voluntary is immaterial & impertinent of Plef. & plead it.

*Coleman* and *Saunders*, for the defendant, argued that the traverse was good. For in the policy there are two clauses: one, if the ship, or tackle and apparel, are damaged, the plaintiff may labor to save them, and the defendant is to pay his proportion of the charges of it; and the other, that if the ship, &c., shall be totally lost, then the defendant is to pay £50. And here the plaintiff avers a total loss of the ship and goods, &c., wherefore he demands the £50. And the plaintiff has averred in the copulative, "that the said ship, tackle, apparel, ordnance, munition, artillery, and other furniture" were totally lost, whereby he has given an advantage to the defendant to traverse it precisely as the plaintiff has alleged it; as in the case of *Tatem v. Perient*,<sup>1</sup> where the plaintiff had alleged more than he needed in his declaration, and thereby gave an advantage to the other side to traverse it. So in *Sir Francis Leke's Case*. And although this action is only to recover damages, and no penalty, yet the plaintiff ought not to recover damages on this breach, but ought to have recovered damages for not contributing to the charges, &c., and if he so had done, then the loss or spoliation of each particular thing ought to have been put in issue; for the damages were to be recovered particularly for every thing according to the proportion of the thing lost or spoiled, and of the defendant's assurance. But here the plaintiff would recover the entire £50, although there is only an anchor or cable lost; but in such case the defendant ought to come to an average only.

But notwithstanding this, it was adjudged for the plaintiff, because, as *Twysden* declared, it was only an action for damages, and the defendant might aid himself on the writ of inquiry; and if he had traversed in the disjunctive, and issue had been joined upon it, the defendant might give in evidence any such matter in mitigation of damages. And as it seemed to me, he did not comprehend the difference urged by the defendant, but without any great consideration a writ of inquiry was awarded.<sup>2</sup>

to as-  
certain  
what  
damages.

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### SIR RALPH BOVY'S CASE.

IN THE KING'S BENCH, TRINITY TERM, 1672.

[Reported in 1 *Ventris*, 217.]

IN debt upon an escape; the plaintiff sets forth in his declaration a voluntary escape.

<sup>1</sup> *Yel.* 195.

<sup>2</sup> *Moore v. Boulcott*, 1 B. N. C. 823; *Stubbs v. Lainson*, 1 M. & W. 728; *Dawson v. Wrench*, 8 Ex. 859; *Richardson v. Smith*, 29 Cal. 529, accord. Conf. *Eden v. Turtle*, 10 M. & W. 685; *Bradley v. Milnes*, 1 B. N. C. 644. — Ed.

The defendant protesting that he did not let him voluntarily escape, pleads that he took him upon fresh pursuit. To which it was demurred, because he did not traverse the voluntary escape, and resolved for the defendant; for it is impertinent for the plaintiff to allege it, and no ways necessary to his action. It is out of time to set it forth in the declaration; but it should have come in the replication. It is like leaping, as Hale, C. J., said, before one come to the stile. As if in debt upon a bond the plaintiff should declare that at the time of sealing and delivery of the bond the defendant was of full age, and the defendant should plead *deins age* without traversing the plaintiff's allegation. Whiting and Sir G. Reynell's Case<sup>1</sup> seems to be against it; but Harvey and Sir G. Reynell's<sup>2</sup> is resolved that no traverse is to be taken.<sup>3</sup>

*argumentative  
in form*

### BRIDGWATER v. BYTHWAY.

IN THE COMMON PLEAS, EASTER TERM, 1683.

[Reported in 8 Levinz, 118.]

BATTERY; defendant pleads a judgment obtained by his father against Elias Jones, and an execution thereupon, whereon the goods of Jones were taken in execution, and that the plaintiff assaulted the bailiffs, and would have rescued the goods; whereupon, in aid of the bailiffs, and by their command, the defendant *molliter manus imposuit* upon the plaintiff to prevent his rescue of the goods. The plaintiff replied, *de injuria sua propria absque hoc* that the defendant by command of the bailiffs, and in aid of them, to prevent a rescue of the goods, &c. Whereupon the defendant demurred generally; and upon argument it was resolved by the whole court: 1. That the replication in traversing the command of the bailiffs was not good; for he might of himself do that, to prevent the rescue, which is a tort and a breach of the peace. 2. The defendant's plea is ill; for the action was brought as for a battery at W., and the defendant justifies at L., in the same county; whereas the bailiffs have authority throughout the whole county, and therefore the cause of justification in the same county not local, so that he should have conformed and justified in the same place, being the same county, where the plaintiff declared. And if the place had been material, he ought to have traversed all other

<sup>1</sup> Cro. Jac. 652.

<sup>2</sup> Latch, 200.

<sup>3</sup> Hollis v. Palmer, 2 B. N. C. 718; Ricketts v. Loftus, 14 Q. B. 482; Middleton v. Graveley, 12 Price, 518, accord. See Lush v. Russell, 5 Ex. 207, per Parke, B. — Ed.

but the declaration of full age is immaterial hence the plea may proceed in regular way without regard to immaterial statement in Declaration.  
Battery.

Def. pleads that Plf. was assaulting certain bailiffs who were taking certain goods on execution and that Plf. was trying to retake goods & that he at command of Bailiffs laid hands on & prevented Plf. from taking goods. Plf. traversed the command. Def. demurs. ~~to~~ <sup>in Reply</sup> ~~for~~ ~~Def.~~ <sup>held</sup>. 1. That traverse of demand was bad because immaterial. 2. Plea bad. Because if immaterial Def. should traverse same place, if material Plf. should justify at actual place & traverse all other places. Here he justified at L. without traversing at W.

Gen'l Issue would not be sufficient if plea were material or immaterial.



Deft was a specialty.

Deft. promised to marry Pltf. & bound himself in 200 £ to Pltf. to do so. Plea: that he did not marry Pltf. but another woman.

Plea: That he offered to marry her & she refused without this that he refused to marry her before she refused to marry him.

Replie: That Pltf. tendered herself to marry Deft. and he refused without this that he offered to marry her.

Steld that Deft. had traversed more in ~~his~~ his plea than declaration alleged & hence Pltf. might well traverse it.

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Argumentation must be taken advantage of by special demurrers. Of course he may disregard this & plead to substance.

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Had the traverse in Plea been material Pltf. would have been forced to join issue but not bring ma-

places within the same county; and *sic, quacunqve via data*, the plea is ill. Whereupon judgment was given for the plaintiff.<sup>1</sup>

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CROSSE v. HUNT.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1689.

[Reported in *Carthew*, 99.]

DEBT upon a specialty for £200, which was to this effect, *scil.*, that the defendant did declare from his heart before God that he had taken the plaintiff to be his wife, as she had taken him for her husband; and the more to confirm the said plaintiff that he had no design but to perform his promise aforesaid, he the said defendant obliged himself by the same deed to pay unto the plaintiff £200 if he should happen to be so base as to be worse than his word, and that if he did not pay it when demanded, she the plaintiff should have good right to sue and recover it by law, &c.

The breach assigned was, that she had tendered herself to marry the defendant, but that he refused, and afterwards married another woman, *per quod actio accrevit*, &c.

The defendant pleaded that he after the making the aforesaid writing *obtulit se* to marry the plaintiff, and she refused, *absque hoc*, that he refused to take her for his wife (before she had refused to take him for her husband).

The plaintiff replied that she tendered herself to marry the defendant, and he refused, *absque hoc*, that the defendant offered himself to marry the plaintiff, *et hoc*, &c.

And upon a demurrer to this replication, it was insisted for the defendant that the traverse in it was ill, because she had traversed that which was the inducement of the traverse in the bar; so that it is a traverse upon a traverse, which the law will not allow.

Besides, the words of this deed are *in præsenti*, and not executory, but declaratory of an act executed.

On the other side it was argued that the words in this deed are sufficient to create a contract, and that of the highest nature, for God is called as a witness to it; and these words cannot import any other sense, but only a contract to marry the plaintiff.

That the traverse in the bar is ill, because it is too large, for the defendant had traversed more than was alleged in the declaration.

<sup>1</sup> *Parish v. Stanton*, 2 Root, 155, *accord.* — Ed.

*Scil.* *Absque hoc*, that he had refused to take the plaintiff for his wife before she had refused to take him for her husband; so that he intended to make this circumstance of time parcel of the issue; whereas there is no such circumstance alleged in the declaration, nor any affirmation, that the defendant had refused before the plaintiff had refused; and therefore because the traverse in the bar was idle and frivolous, the plaintiff might well traverse the substance of the matter of the bar; and of this opinion was the court as well to the pleading as to the matter in law.

*Judgment for the plaintiff.*<sup>1</sup>

*out.*

### WHITE v. BODINAM.

IN THE QUEEN'S BENCH, EASTER TERM, 1704.

[Reported in 2 Salkeld, 629.]

LESSEE for years brings covenant against the lessor, declaring upon a demise and covenant for quiet enjoyment, and assigns for breach that the lessor did enter upon him and oust him of the premises. The defendant pleads, that he entered to distrain for rent-arrear, *absque hoc*, that he ousted him *de præmissis*. To which the plaintiff demurred, thinking the traverse ill; because if he ousted him of any part of the premises, he had a good cause of action, therefore he should have traversed, *absque hoc*, that he ousted him of the premises, or of any part thereof. *Vide* Colborne v. Stockdale. But, *per Cur.*, The plea is well enough in this case; for if the plaintiff will join issue upon the matter of the traverse, and prove the ouster of any part, the issue shall be for him. And the court took a diversity between pleading the general issue, as in debt, you must plead *non debet nec aliquam inde parcelam*, and a special issue, as this is. 3 Cro. 83, 84; Dyer, 115.

*Judgment for the defendant.*<sup>2</sup>

<sup>1</sup> Powers v. Cook, Ray. 68; Talbot v. Woodhouse, 8 Lutw. 474; Rex v. Jordan, C. T. Hard. 356; Bishton v. Evans, 2 C., M. & R. 12; Worley v. Harrison, 8 A. & E. 669; Bird v. Holman, 9 M. & W. 761; Trower v. Chadwick, 8 B. N. C. 384; Breck v. Blanchard, 10 N. H. 823, *accord.* — Ed.

<sup>2</sup> Teril v. Dune, Dy. 115 b; Robert v. Andrews, Cro. El. 82; Waltham v. Sparks, Ray. 42, *accord.* — Ed.

51 An. du. 122

✓

Use to material part.

Concurrence.

Declar. Drives & Concurrence for quiet enjoyment. Breach. ouster from premises.

Plea. Entered to distrain for rent arrears, without <sup>out</sup> that he ousted him from premises.

Defendant claiming that P'ty. should <sup>have</sup> pleaded that he did not oust him from premises or any part thereof.

Held that if P'ty. proved ouster from some part he would gain Judgment under Def't's plea.

J. for Def't.

~~4~~ Dowling 488 - 1 Chitty 642.

Replevin:-

Declar. took cattle of P'ty.

Consequence. Deft's master is seized in fee  
of locus in quo & Deft. took cattle  
damage fees ant.

Reple that P'ty. owns a 1/8 part of  
such place & Deft. master not  
seized in fee.

Demurrer.

Held that Reple. is good for the  
in seizure in fee being in declaration plea  
a sole seizure is implied & hence

transu of sole seizure good.

In a proper abeyance he transu the abe-  
que he is generally the material part  
to be tried

Debt on a bond.

Plea that part of sum mentioned in  
condition of bond to wit 1500 £ was  
won by gaming contra firmam Statuti  
et al.

Reple. That bond was given for just  
debt & the 1500 £ was not won  
by gaming.

Demurrer.

Held - Replication is bad. The amt.

## GILBERT v. PARKER.

[IN THE QUEEN'S BENCH, EASTER TERM, 1704.]

[Reported in 2 Salkeld, 629.]

IN replevin for taking cattle, the defendant made conusance that A., his master, was seised of the *locus in quo*, and *per ejus præcept*, he took them damage-feasant. Plaintiff replied, that he was seised of one-third part, and put in his cattle, *absque hoc*, that the said A. was sole seised. To this the defendant demurred, and judgment was given against him; for the defendant makes a conusance under his master as sole seised, when he was only tenant in common; in which case he should have pleaded according to the truth, that he was only tenant in common, &c. When the defendant pleads his master was seised in fee of the place where, &c., that must necessarily be understood that he is sole seised; and whatever is necessarily understood, intended, and implied, is traversable as much as if it were expressed; and, therefore, though a seisin in fee is only alleged generally, yet that being intended a sole seisin, the plaintiff may traverse, *absque hoc*, that he is sole seised; since the plaintiff makes himself tenant in common with the defendant, it had not been enough to say that he is tenant in common, without traversing the sole seisin.<sup>1</sup>

omit.

## COLBORNE v. STOCKDALE.

IN THE KING'S BENCH, HILARY TERM, 1722.

[Reported in 1 Strange, 498.]

DEBT upon a bond conditioned for the payment of £1,550. The defendant upon *oyer* pleads in bar that part of the sum mentioned in the condition, *scil.*, £1,500, was won by gaming, contrary to the statute, *per quod* the bond became void. The plaintiff replies that the bond was given for a just debt, and traverses that the £1,500 was won by gaming, *contra formam statuti modo et forma*, as the defendant has pleaded. The defendant demurs, and

*Strange, pro def.*, argued that the replication was ill, because it

<sup>1</sup> Meriton v. Briggs, 1 Ray. 89; Bonner v. Walker, Cro. El. 524; Chambers v. Jones, 11 East, 406; E. & L. R.R. Co. v. Hebblewhite, 6 M. & W. 707; Bowdon v. Hall, 4 Q. B. 851 *accord.* — Ed.

makes the sum parcel of the issue, and obliges the defendant to prove that the whole sum of £1,500 was won by gaming; whereas the statute avoids the bond, if any part of the consideration became due on that account; and he urged the common case of a plea of payment before the day, where if issue is joined, and a verdict *pro quer*, there shall be a repleader, because it leaves it open to a possibility that there might be a payment at the day, and then the plaintiff could have no cause of action; so in this case the finding that the whole sum of £1,500 was not won by gaming will not toll the presumption as to a less sum. Besides, the sum is put in only for form, and therefore within the reason of the case of *Stallard v. Tims*, the replication will be ill, for making it the substance of the issue.<sup>1</sup>

*Wearg*, contra, insisted that the replication following the words of the plea would be well enough; and cited Dy. 365, pl. 1, for that purpose. *Sed per Curiam*, There is no color to maintain the replication; the material part of the plea is, that part of the money for which the bond was given was won by gaming, and *scilicet*, so much, is only matter of form, of which no notice should be taken in the replication.<sup>2</sup>

*Over.*

# GRILLS v. MANNELL.

IN THE COMMON PLEAS, NOVEMBER 29, 1742.

[Reported in *Willes*, 878.]

THE following opinion of the court was given by

WILLES, LD. C. J. Replevin, in which the plaintiff declares for taking one red ox, one brown ox, and two brown steers, on the 28th of March, 13 Geo. II., at a place called Trewoodla, at Southill, in Cornwall, and detaining them, &c. Damage, £13.

<sup>1</sup> Only so much of the case is given as relates to the sufficiency of the replication.—Ed.

<sup>2</sup> Y. B. fol. 10, pl. 47; *Anon.*, 2 Leon. 18; *Sherman v. Brampton*, Latch, 92; *Rex v. Kilderby*, 1 Saund. 812; *Dring v. Respaw*, 1 Lev. 198; *Thomas v. Nichols*, 8 Lev. 41; *Payne v. Brigham*, 8 Lev. 228; *Palmer v. Elkins*, 2 Stra. 818; *Brown v. Johnson*, 2 Mod. 145; *Helliott v. Selby*, 2 Ray. 902; *Osborne v. Rogers*, 1 Saund. 267; *Thurman v. Wild*, 11 A. & E. 458; *Basan v. Arnold*, 6 M. & W. 559; *De Medina v. Norman*, 9 M. & W. 820; *Tempest v. Kilner*, 2 C. B. 800; *Aldis v. Mason*, 11 C. B. 140; *Caulfield v. Sanders*, 17 Cal. 569; *Thompson v. Fellows*, 21 N. H. 425; *Rogers v. Burk*, 10 Johns. 400; *Baker v. Bailey*, 16 Barb. 54; *Salinger v. Lusk*, 7 How. Pr. 480; *Davidson v. Powell*, 16 How. Pr. 467; *Schaetzel v. Ins. Co.*, 22 Wis. 412, *ac cord.*—Ed.

was by gaining in material. Any  
ant. vacates bond.

Replevin:-

Declaration: Taking of certain cattle  
at certain place.

Affidavit: That cattle were distrained  
on land held by Pltf. for an an-  
nuity under a release & were  
lawfully taken for rent as annuity  
in arrears.

Pleadings: That Pltf. never entered  
premises by virtue of lease & release  
as stated in Affidavit; <sup>he</sup> that he  
was not seized by virtue of re-  
lease in his demesne as of

fee. <sup>first</sup>  
Held, ~~that~~ <sup>1st</sup> plea bad. 1. because  
it denies what was before in  
Effect admitted; that he was



seized in fee by virtue of lease & release. 2. Taverne is a matter of law & hence bad.

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Protecting rally amounted to nothing. Plead to put it in in order to prevent the admissions to W used in another suit. Despite the protest the admission was good for the suit in hand & later admissions by decessor was not used in other suits anyhow.

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The defendant, Mary, avows in her own right, and the defendants, Thomas and Samuel, as her bailiffs, acknowledge the taking, &c.; because they say that long before the time when, &c., viz., on the 25th of March, 4 Geo. II., by a certain indenture made between the said Mary and the plaintiff, the said Mary, for the consideration of a sum of money, did bargain and sell to the plaintiff all that moiety or halfen-deal of all those messuages, &c., in Trewodla, in the parish of South-ill, whereof the said close wherein, &c., then and long before was and is parcel, together with a certain parcel of common, and all other appurtenances, &c., to the said messuage, &c., belonging, then in the occupation of the plaintiff, to hold from the day next before the date of the said indenture for one year; by virtue of which bargain and sale the plaintiff was possessed, &c., the reversion thereof belonging to the said Mary and her heirs, and being so possessed, and the reversion thereof belonging to the said Mary and her heirs as aforesaid, she, the said Mary, afterwards, and before the time when, &c., by another indenture made 26th of March, 4 Geo. II., between the said Mary and the plaintiff, for and in consideration of the annuity therein mentioned to be paid to her from and out of the premises during her natural life, and of 1s. to her in hand paid by the plaintiff, did release to the said plaintiff and his heirs for ever the said reversion with the appurtenances, to have and to hold the same to the plaintiff and his heirs, to the use of him and his heirs for ever, subject to the payment of the rent-charge or annuity thereafter mentioned; that is to say, that it should and might be lawful for the said Mary and her assigns during the term of her natural life to have and receive one annuity or yearly rent-charge of £7 10s. of lawful money of Great Britain, free from all taxes, &c., and to be paid at the four most usual feasts, viz., the feast of St. John the Baptist, &c., by four even and equal portions; and by the said indenture it was agreed that if the said annuity of £7 10s. should be behind and unpaid twenty-one days after any or either of the said feast-days, &c., it should and might be lawful for the said Mary and her assigns to enter upon the premises and to distrain, &c.; by virtue of which said lease and release, and by force of the statute, &c., the plaintiff entered into and became seised of the premises, &c., in his demesne as of fee, subject, &c.; and the defendants justify taking the cattle by way of distress for £9 7s. 6d., arrears of rent due for a year and a quarter ending at Christmas, 1739, and not paid within twenty-one days afterwards, wherefore they pray judgment, &c.

The plaintiff to the avowry, ~~protesting that he never entered into the said premises by virtue of the lease and release~~, for plea saith that he never was seised of the said premises mentioned in the said inden-

ture of release in his demesne as of fee; and this he prays may be inquired of by the country.<sup>1</sup>

To this plea the defendants demur generally.

To the first plea there are two objections:<sup>2</sup> 1st. That it denies what is before admitted; 2d. That the traverse is only of a consequence of law.

And we are of opinion that the first plea is bad in both these respects.

*First.* Because the plaintiff has denied that he was seised in fee by virtue of the lease and release, though he has in effect admitted it before. For in this plea he has not denied, not even by way of *protestando*, that M. Mannell was seised in fee at the time of making the lease and release; and though he has denied it in the second plea, that will make no alteration, it being a known rule and never controverted that one plea cannot be taken in to help or destroy another, but every plea must stand or fall by itself. And as he has admitted in this plea that Mary was seised in fee, and that being so seised she made a lease and release to the plaintiff and his heirs, the necessary consequence of that is that he must be seised in fee by virtue of such lease and release; for I defy any one to put a case where a person seised in fee makes a lease and release to another and his heirs, and yet the grantee shall not be seised in fee; and yet this is the very thing denied by this plea.

*Secondly.* If there could be any doubt of this (but there certainly is none), the only doubt would be, whether this be the necessary consequence in law; that is, whether these deeds of lease and release have this operation in law or not. And it is a certain known rule, never, that I know of, once controverted, that a man cannot traverse a consequence of law, and for this plain reason because it is a matter of law and not of fact, and therefore not proper to be tried by a jury.

We are therefore clearly of opinion with the defendants that the first plea in bar of the avowry is not good.

*Judgment therefore must be for the defendants.<sup>3</sup>*

<sup>1</sup> A portion of the case relating to the second plea, which was held good, is omitted. — Ed.

<sup>2</sup> The case was argued on the 22d of May preceding by Draper, Serjt., in support of the demurrer, and by Gapper, Serjt., *contra*.

<sup>3</sup> *Willion v. Berkley*, *Plow.* 231 a; *Hume v. Liversidge*, 1 C. & M. 332; *Groenvelt v. Burwell*, *Ray.* 454; *Crowther v. Ramsbottom*, 7 T. R. 654; *Dangerfield v. Thomas*, 9 A. & E. 292; *Rixford v. Wait*, 11 Pick. 339, *accord.* *Conf. Beal v. Simpson*, *Ray.* 410; *Grocers' Co. v. Archbishop*, 2 Blackst. 776; *Avery v. Cheslyn*, 8 A. & E. 75; *Lucas v. Nockells*, 4 Bing. 729; 10 Bing. 158; *Carnaby v. Welby*, 8 A. & E. 872; *Hewitt v. Macquire*, 7 Ex. 80; *Ransford v. Copeland*, 6 A. & E. 482; *Drewe v. Lainson*, 11 A. & E. 529; *Frost v. Hammatt*, 11 Pick. 70; *Stickle v. Richmond*, 1 Hill, 77 — Ed.



Detinue:-

The plea was a traverse of the delivery.

Since after Gledstane v Hewitt the bailment is immaterial in detinue the plea was held bad.

Declaration in Detinue like in trover was founded on fiction. Detinue of two kinds Sub Trover & by that is by finding & by bailment in which Plff. declared goods were bailed to Deft.

Replevin:-

Decla:- Taking of certain goods.

Answer:- Goods were property of one Miller & Deft. took them as such.

Plea: A previous Taking under a fi. fa. against Miller.

Repli: Protesting the issue of the fi. fa. asserting that Plff. did not lawfully hold them under the fi. fa.

Held: That Repli. is bad. Tries to put in issue matter of law; the lawful holding of goods under fi. fa.

Suppose defence - fi. fa. not issued. Repli. should be; special names of the issuing of the fi. fa.

If for some other reason the holding was unlawful the plea would be concerning the fi. fa. & setting

## WALKER v. JONES.

IN THE EXCHEQUER, EASTER TERM, 1834.

[Reported in 2 Crompton &amp; Meeson, 672.]

IN this case, which was an action of detinue, the defendant pleaded a plea traversing the delivery; to which there was a demurrer. On the demurrer being called on for argument,

*Comyn* stated that the plea had been drawn from a precedent in *Chitty*;<sup>1</sup> but that, after the case of *Gledstane v. Hewitt*,<sup>2</sup> from which it appeared that the bailment in detinue was immaterial, he could not support the plea.

*The plea was ultimately struck out on payment of costs.*<sup>3</sup>

## FOSHAY v. RICHE.

SUPREME COURT, NEW YORK, JANUARY, 1842.

[Reported in 2 Hill, 247.]

DEMURRER to replication. The declaration was in replevin for taking, &c., certain goods. The defendant avowed the taking, &c., of the goods, as the property of one Miller, in whose possession they were at the time when, &c. Plea, a prior taking of the goods by the plaintiff, as under-sheriff of the county of Westchester, on a *fi. fa.* issued against said Miller; and that at the time of the taking complained of, he, the said plaintiff, held and detained the goods in question by virtue of the *fi. fa.*, and for the purpose of satisfying the same. Replication, (protesting the issuing of the *fi. fa.*, and) asserting that the plaintiff did not, at the time when, &c., lawfully hold and detain the goods in virtue thereof. Demurrer and joinder.

*M. T. Reynolds*, for the plaintiff.

*J. L. Tillinghast*, for the defendant.

*Per Curiam.* The replication attempts to put in issue matter of law, rather than of fact. It protests the issuing of the *fi. fa.*, and then,

<sup>1</sup> 3 Chit. (4th ed.) 1028.

<sup>2</sup> 1 C. & J. 565.

<sup>3</sup> *Kempe v. Crews*, Ray. 167; *Cooke v. Birt*, 5 Taunt. 765; *Hall v. Tapper*, 8 B. & Ad. 655; *Lush v. Russell*, 5 Ex. 207; *Radford v. Smith*, 8 M. & W. 254; *Spaeth v. Hare*, 9 M. & W. 826; *Reg. v. Dendy*, 22 L. J. Q. B. 247; *Hodgins v. Hancock*, 14 M. & W. 120; *Whitehead v. Harrison*, 6 Q. B. 428; *Chandler v. Chandler*, 21 Ark. 95; *Freeman v. Curran*, 1 Minn. 169; *Gates v. Lounsbury*, 20 Johns. 427; *Marvin v. Wilkins*, 1 Aik. 107; *Hale v. Dennie*, 4 Pick. 501; *Loring v. Gay*, 9 Pick. 66, accord. — ED.

without meeting the plaintiff's allegation that, at the time of the taking complained of, he held and detained the goods under a *fi. fa.* in virtue of a previous levy, it simply asserts that he did not lawfully hold and detain them. In short, the replication neither denies the matters alleged in the plea, nor does it confess and avoid them. There must be judgment for the plaintiff. *Ordered accordingly.*<sup>1</sup>

<sup>1</sup> *Mason v. Craig*, 8 St. & Port. 889; *State v. Saddler*, 6 Ark. 286; *Cassady v. Clarke*, 7 Ark. 128; *Calvert v. Lowell*, 10 Ark. 147; *Landis v. People*, 89 Ill. 79, *accord.* See *Swift v. Macken*, 8 L. R. C. L. 140. — Ed.



forth further facts to show it illegal.

Protestation nothing as before.



Generally true in action in cases that general issue puts in issue all material facts of declaration.

Not in some jurisdictions a general denial is allowed which puts in issue all material facts.

Declaration: Sale of horse by Deft. to Plf. & warranty that it was sound & quiet in harness.

Plea: no such undertaking & promise.

Witnesses: Witnesses proved that Deft. warranted horse sound & quiet in all respects. Held to include warranty of "quiet in harness". Witnesses tending to prove injury by Plf. to horse ruled in ad. missile as plea did not put the soundness in issue.

Can show that breach of contract must be specifically denied if the defense is no breach. It cannot be shown under non-assumpsit.

## SECTION II.

*General Issue and Specific Traverses.*

## (a) SPECIAL ASSUMPSIT.

## SMITH v. PARSONS.

AT NISI PRIUS, CORAM LORD ABINGER, C. B., JUNE 27, 1837.

[Reported in 8 Carrington &amp; Payne, 199.]

THE declaration stated in substance that, in consideration that the plaintiff would give the defendant a horse, and the sum of £2, the defendant agreed to sell him a horse, and undertook and promised that the horse was sound, and quiet in harness, whereas in fact it was not, &c.

The defendant pleaded only that he did not undertake and promise in manner and form as the plaintiff had alleged.

A witness was called for the plaintiff, who stated that after the bargain was made, and when the plaintiff was about to take away the horse he had purchased of the defendant, he said to him, "I suppose you warrant it all right, sound and quiet to drive;" to which the defendant replied, "Yes, it is all right; I warrant it perfectly sound and quiet in all respects."

*Payne*, for the defendant, inquired whether his Lordship thought the warranty proved agreed with that stated in the declaration.

LORD ABINGER, C. B. Yes; I think it does. The warranty proved is, that the horse was sound and quiet in all respects, and that includes the being quiet in harness.

*Payne* then proposed to call witnesses to show that the plaintiff himself had injured the horse, and that it was not unsound at the time of the sale.

LORD ABINGER, C. B., was of opinion that the plea did not put in issue the question of soundness, and therefore that the evidence was not admissible.

*Verdict for the plaintiff; damages, £8.*<sup>1</sup>

<sup>1</sup> See *Shilcock v. Passman*, 7 C. & P. 289. ✓ Conf. *Warre v. Calvert*, 7 A. & E. 156 ✓  
—Ed.

## DE PINNA v. POLHILL.

AT NISI PRIUS, CORAM TINDAL, C. J., JUNE 29, 1837.

[Reported in 8 Carrington &amp; Payne, 78.]

*If one sell another must buy hence if there was a promise to buy, it necessarily includes a promise to sell & hence the contract probably bilateral.*

THE first count of the declaration stated that before the commencement of the suit, and before the making of the promise, &c., the plaintiff had composed and written the music and poetry of a certain opera, called "The Rose of the Alhambra, or the Enchanted Lute," and, as such composer and author, had a right to the music and poetry of the said opera, and in consideration of the premises, and that the plaintiff would sell him such right for three hundred guineas, the defendant undertook and faithfully promised to buy of him his right in the said music, &c. It then averred default on the part of the defendant. There was a second count, stating that three hundred guineas was to be paid for the permission to perform the opera at Covent Garden Theatre, and the Lyceum or English Opera House. The defendant pleaded only the general issue, that he did not undertake and promise in manner and form, &c.

The agreement consisted of two letters, which were mutually signed by the parties and exchanged. One of the plaintiff's witnesses admitted on his cross-examination that one of the songs was written by Mr. Fitzball.

*Crowder*, for the defendant. The question is, whether this is to be taken as a sale of the copyright of the music and poetry. There is an averment that the plaintiff did sell.

TINDAL, C. J. You have not taken issue upon that. If you had, the question would arise whether any thing short of a deed would do.

*Crowder*. There is no evidence that the plaintiff was the author of the poetry. On the contrary, it appears that Mr. Fitzball wrote one of the songs. Is the defendant to pay the three hundred guineas, and then find that he has no right at all?

TINDAL, C. J. All your difficulty arises from the state of the record. You do not say that the plaintiff did not write and compose.

*Thesiger*, for the plaintiff. There is a case of *Barnett v. Glossop*,<sup>1</sup> in which this point arose: that was an action on a verbal agreement, and it was held that a defence on the ground that the agreement should have been in writing must be pleaded specially.

*Crowder*. It does not appear that there was not to be a regular transfer by deed.

TINDAL, C. J. I think there ought to be, but you have admitted that there was.

<sup>1</sup> 8 Dowl. Prac. Ca. 625.

Declaration:- Deft. promised to buy of Plf. & Plf. promised to sell to Deft. certain music poetry forming an opera. Default by Deft.

Plea - Gen'l Issue.

Held: that the question of actual sale & necessity for a deed & of the authorship of Plf. & hence his right to sell must be pleaded specially & could not be put in issue by the Gen'l Issue.

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Delivery of horse could not be negated by evidence under non assumption.

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In a unilateral contract non-performance would be allowable under non-assumption, as being a part of consideration.

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In a bilateral contract the promisee make the considerations & hence the facts alleged attempted to be proved must be put in issue by specific traverse - that is by traverse of the performance or the condition.

~~... by ...~~  
Less implied conditions. Unless  
are conditions barres of per-  
formance in bilateral contracts  
would be useless.

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Declaration in a contract to hire for  
a year for 150 £. Breach dis-  
charge before End of year.

Plea: Non-assumpsit.

Proved, that there existed a usage  
that in all such contracts was  
determinable by three months  
notice.

Held that a determinable con-  
tract could not be described  
as an absolute one, that the  
variance was fatal.

Williston disagrees with the case.  
Holds this custom a collateral  
stipulation & hence should have  
been pleaded as a defence.

*Crowder.* Does not your Lordship think that the denial of the promise is a denial of that on which it is founded.

TINDAL, C. J. No; they are separate averments antecedent to the promise, and you should have pleaded that the plaintiff did not sell, or that he had not the right, or that he was not the author; and as you have not, you must be taken to have admitted these facts as far as the jury are concerned, who have to decide on this issue.

*Verdict for the plaintiff; damages, £315.<sup>1</sup>*

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METZNER v. BOLTON.

IN THE EXCHEQUER, HILARY TERM, 1854.

[Reported in 9 Exchequer Reports, 518.]

THE declaration stated that, in consideration that the plaintiff would enter the service of the defendant as a commercial traveller for one year, the defendant agreed to employ the plaintiff in the capacity aforesaid, at and for the yearly salary of £150, and to continue him in such service for one whole year. Averments, that the plaintiff entered into the service of the defendant in the capacity and on the terms aforesaid, and continued in such service until a certain day before the expiration of the year. Breach, that although the plaintiff was ready and willing to continue in the service of the defendant, yet the defendant wrongfully dismissed him therefrom.

Plea, non-assumpsit.

At the trial before Martin, B., at the London sittings after last Trinity term, the plaintiff was examined, and proved that he and the defendant met at a hotel in London, when an agreement was come to between them precisely as stated in the declaration; that he entered into the employment, and went a journey into the west of England, after which the defendant dismissed him within the year, upon a ground which turned out to be unfounded. On cross-examination, the plaintiff admitted that there was a usage in the trade in which the plaintiff was so employed, that in any yearly hiring of a traveller either party might put an end to the employment on giving three months' notice.

It was objected on behalf of the defendant that, under these circumstances, if such usage was proved to exist so generally as that it was to be considered as imported into the contract of hiring, there

<sup>1</sup> Conf. Bell v. Welch, 9 C. B. 154. — Ed.

*Before* {  
*Com. Dig. Pleader. 4. 11. 14.*  
*Co. El. 201.*  
*Thrs. 106. Thrl. 50. Dong. 21.*  
*Bar. Abr. Plea, 1st. H. 5.*

would be a misdescription of the contract, and a variance upon non-assumpsit. The learned judge thought that the contract being for a year was proved according to the allegation, and that the power to determine it, coming by way of defeasance of the contract, need not be noticed by the plaintiff, but must be pleaded and proved by the defendant. The plaintiff's counsel then agreed that it should be taken as a fact that the engagement was so determinable; and the question of damages having been left to the jury, they found a verdict for the plaintiff for £56.

A rule *nisi* having been obtained to set aside the verdict, and for a new trial, on the ground of misdirection,

*Prentice* showed cause in Hilary term (January 17). There is no misdescription of the contract. With respect to a covenant or a statute, the rule of law is clear. In declaring on a covenant it is not necessary to notice a proviso or condition subsequent; though it is otherwise where the exception is contained in the covenant itself. *Vavasour v. Ormrod*.<sup>1</sup> So where a statute imposes a penalty, and in a subsequent clause there is an exemption, that must come by way of plea. *Chitty on Pleading*, vol. i. p. 245 (7th ed.). This is a middle case. The contract is to employ for a year; but it is sought to import into it the usage of trade to determine the employment by three months' notice. That custom is in the nature of a proviso or condition subsequent in a deed, and should therefore be pleaded. In the case of a tenancy from year to year, the law implies that it may be determined by proper notice; but in declaring on such a contract, it is not necessary to show how it may be determined. [PARKER, B. It is stated as a tenancy from year to year for so long as both parties shall agree.] This resembles the case of a lease for seven years, with a proviso for determining it at the end of the first year; and in declaring on such a lease the proviso need not be noticed. [ALDERSON, B. When a person hires a domestic servant, though nothing is said about notice, it is plain that, according to the custom of England, it is a hiring for a year, with liberty to put an end to the contract by giving a month's notice. So in making this contract the parties must be supposed to be speaking according to the custom of the trade; and the plaintiff would say to the defendant, "I agree to hire you for a year, provided that if I give you three months' notice the contract shall be put an end to." That is not an absolute hiring for a year certain.] *Smart v. Hyde* is an authority that if the custom relied on in this case had been pleaded, the plea would not have been bad as an argumentative denial of the contract. In *Weedon v. Woodbridge*,<sup>2</sup> the plea set up a consideration for the promise materially different from that stated in the declaration.

<sup>1</sup> 6 B. & C. 480.

<sup>2</sup> 13 Q. B. 462.

*This was in the  
lower court  
& was overruled  
in Ex. Ch.*

Being in the fact that performance of conditions must be specifically traversed if it is intended to deny it. Non-assertion does not deny performance of conditions. In last case.

This statement would be a condition subsequent in form.



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and yet it was held not to amount to the general issue. It is said that the defendant is prejudiced by this mode of declaring, because he cannot pay money into court without admitting the contract; but that objection would equally apply to a declaration against a carrier for the loss of goods, which may be in the common form, notwithstanding he has by notice limited his responsibility to a particular amount. *Clarke v. Gray*.<sup>1</sup>

*T. Jones*, in support of the rule. The doctrine as to provisos and exceptions, which is not disputed, has never been applied to declarations on parol contracts. The observations of Lord Tenterden in *Vavasour v. Ormrod*<sup>2</sup> are confined to instruments under seal. The true test in this case is, whether a plea that the employment was determinable by three months' notice would, before the Common-law Procedure Act, have been bad as amounting to the general issue. It is submitted that it would, inasmuch as it would have set up a contract inconsistent with that alleged. The declaration states an absolute contract, whereas the plea would show that it was conditional. *Nash v. Breeze*<sup>3</sup> and *Sharland v. Leifchild*<sup>4</sup> are express authorities that a plea which introduces matter qualifying the contract stated in the declaration is bad as amounting to the general issue. In *Smart v. Hyde*, the matter pleaded did not contradict the contract, but was something collateral to it. *Baxter v. Nurse*<sup>5</sup> affords a strong instance of the admissibility of evidence for the purpose of explaining a contract by usage. Here the contract was, that the service should only last so long as either party refrained from giving the other three months' notice, and that is totally inconsistent with the statement in the declaration that the plaintiff agreed to continue the defendant in his service for one whole year. *Cur. adv. vult.*

The judgment of the court was now delivered by

PARKE, B. This case was argued during last term, upon showing cause against a rule for a new trial of a cause tried before my brother Martin. My Lord Chief Baron, my brothers Alderson, Martin, and myself were present. It was an action of assumpsit. [His Lordship then stated the pleadings, facts, and ruling of the learned judge, as above set forth.] We think that this ruling of the learned judge cannot be supported

It is quite certain that general usages are tacitly annexed to all contracts relating to the business with reference to which they are made, unless the terms of such contracts expressly or impliedly exclude them. This, therefore, must be considered as a contract for the defendant to hire, and the plaintiff to serve for a year, determinable

<sup>1</sup> 6 East, 564.

<sup>2</sup> 6 B. & C. 480.

<sup>3</sup> 11 M. & W. 352

<sup>4</sup> 4 C. B. 529.

<sup>5</sup> 6 Man. & G. 985.

on three months' notice. *Whittaker v. Mason*.<sup>1</sup> And the question is, whether in this form of action this power of determining the contract need be noticed by the plaintiff in describing it. In an action of covenant on an instrument under seal, consisting of several clauses, there is no doubt the plaintiff may declare upon so much of the deed as contains the covenant on which he proceeds, which is obligatory because it is under seal; and it is for the defendant to show the proviso, if any, which defeats it. See 1 Saunders, 233 *a*, note. So, where an interest or estate passes presently, and is to be divested by matter subsequent, it is enough to state the estate which vested; and the matter defeating it must be pleaded by the party who would take advantage of it. *Ughtred's Case*.<sup>2</sup> But this is not either the description of a covenant under seal, or of a vested estate or interest, but of the substance and effect of a parol contract between the parties, and a defeasible contract cannot correctly be described as an absolute one.

It is not true that the defendant undertook to employ the plaintiff for a year in consideration of the plaintiff's services for a year, for the true contract was, that the defendant would employ him for a year, determinable at any time by three months' notice, in consideration of the plaintiff serving him for that time. And if, instead of stating the contract in this short form, it had been expanded into a statement of a contract with mutual promises, the whole to be done on each side must have been stated, and it would have been clearly a variance to allege that the contract on the plaintiff's side was to serve for a year; because it was only to serve for a year unless he or the defendant chose to determine it by three months' notice; and so the corresponding promise to employ by the defendant. The shorter statement in the declaration in this case cannot exonerate the plaintiff from stating the substance of the contract correctly. Had this defeasance been stated by way of plea to this declaration, it would have been demurrable specially, before special demurrers were abolished, on the ground that it amounted to the general issue, because it was a qualification of the contract itself, and therefore an argumentative denial of the contract alleged. The abolition of special demurrers cannot make a difference in the meaning of the words of the allegation, and a contract with a defeasance is not the same as a contract without one, consequently the variance is fatal. We think, therefore, that the ruling cannot be supported.

My brother Martin is not quite satisfied with this view of the case, and would, we believe, decide it otherwise if the decision depended on himself.

*Rule absolute.*<sup>3</sup>

<sup>1</sup> 2 Bing. N. C. 859.

<sup>2</sup> 7 Rep. 9 b.

<sup>3</sup> Conf. *North v. Wakefield*, 13 Q. B. 536; *Fazakerly v. M'Knight*, 26 L. J. Q. B. 80.—ED.

In special assumpsit.

I Pley. alleges contract without alleging condition precedent.

Non assumpsit the plea.

II Pley. alleges contract & condition but not performance.

Demurrer.

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III Pley. alleges contract. There are collateral stipulations.

Def. must plead them specially in defence.

---

IV Pley. alleges contract. There are conditions subsequent.

Def. must plead them specially as defence.

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Moreover you find a debt (requisite of genl ass.) and a contract (requisite of Spe. Ass.) you can bring either of the two actions.

In genl assumpsit.

Non-assumpsit denies Debt. promised. to prove this plea must prove no debt.

Case right. There was no debt unless conditions were complied with & hence non assumpsit correct.

Debt for goods sold & delivered.

Plea nonquam in debitum.

Evidence was offered that the goods were delivered on credit not yet expired. Should admit it under the general issue. No debt or cause of action existed until the expiration of time.

Case wrong. Debt. was indebted & must plead the credit.

In genl assumpsit now assumpsit

*General Issue and Specific Traverses — (continued).*

## (b) GENERAL ASSUMPSIT.

## GARDNER v. ALEXANDER.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1834.

[Reported in 3 Dowling, 146.]

KELLY moved for a rule for leave to plead several matters. The action was for goods bargained and sold. The declaration was in the common form, and the alleged defence was, that the goods were bargained and sold; but that it was under a special written contract, two of the conditions of which were, that the goods should be shipped within the current month, and landed in London within a given time. Neither conditions having been complied with, the defendant refused to accept the goods. The difficulty which had arisen in the mind of the special pleader was, whether proof of these facts could be given under the general issue, or whether it was not requisite to plead them specially.

*Per Curiam.* It is unnecessary: you may give in evidence the special contract under the general issue.

*Kelly* took nothing by his motion.<sup>1</sup>

~~DEBT.~~

## BROOMFIELD v. SMITH.

IN THE EXCHEQUER, TRINITY TERM, 1836.]

[Reported in 1 Meeson &amp; Welsby, 542.]

DEBT for goods sold and delivered. Plea, *nunquam indebitatus*. At the trial before Arabin, Serjt., at the Sheriff's Court in London,

<sup>1</sup> GOODS BARGAINED AND SOLD — GOODS SOLD AND DELIVERED: Grounsell v. Lamb, 1 M. & W. 352; Garey v. Pyke, 10 A. & E. 512; Cousins v. Paddon, 2 C., M. & R. 547; Symes v. Goodfellow, 4 Dowl. 642; Edmands v. Harris, 2 A. & E. 414; Roffey v. Smith, 6 C. & P. 662, *contra*. WORK AND LABOR: Milner v. Field, 5 Ex. 829; Bracey v. Carter, 12 A. & E. 373; Long v. Orsi, 18 C. B. 610; Randall v. Ikey, 4 Dowl. 682; Turner v. Diaper, 2 M. & G. 241; Newton v. Forster, 12 M. & W. 772; Jones v. Reade, 5 Dowl. 216. MONEY PAID: Lewis v. Samuel, 8 Q. B. 685. MONEY HAD AND RECEIVED: Brownrigg v. Rae, 5 Ex. 489. MONEY LENT: Mathew v. Blackmore, 1 H. & N. 762. ACCOUNT STATED: Thomas v. Hawkes, 8 M. & W. 140; French v. French, 2 M. & G. 644; Clarke v. Webb, 1 C., M. & R. 29; Wilson v. Wilson, 14 C. B. 616; Petch v. Lyon, 9 Q. B. 147; Wells v. Girling, 8 Taunt. 737; Pierce v. Evans, 2 C., M. & R. 294; Smith v. Winter, 12 C. B. 487. USE AND OCCUPATION: Waddilove v. Barnett, 2 B. N. C. 538, *accord*. — ED.

the sale and delivery having been proved, the defendant proposed to show that the goods were sold on a credit which had not expired when the action was brought. It was objected for the plaintiff, on the authority of *Edmunds v. Harris*,<sup>1</sup> that such defence was not admissible unless specially pleaded; the learned serjeant so ruled, and rejected the evidence, and the plaintiff had a verdict.

*Barstow* obtained a rule for a new trial, citing *Taylor v. Hilary*,<sup>2</sup> *Cousins v. Paddon*,<sup>3</sup> and *Alexander v. Gardner*, to show that *Edmunds v. Harris* could not be supported.

*Ryland* showed cause, and again relied on *Edmunds v. Harris*. [ALDERSON, B. How does this evidence confess or avoid the debt? It denies that there ever was a debt before action brought.] It admits a *debitum in præsenti solvendum in futuro*. [ALDERSON, B. There is no debt till the credit has expired. How is the defendant indebted for goods sold and delivered till then?] The principle of the New Rules is, that any matter which goes to avoid the cause of action must be specially pleaded. [ALDERSON, B. Avoiding is admitting the cause of action, and afterwards avoiding it; here the defendant denies a cause of action.] The evidence appears to admit a debt, though not yet payable.

LORD ABINGER, C. B. It would show that the plaintiff had no cause of action at the time of action brought. This court has already decided<sup>4</sup> that where there is a special contract for goods sold, which has not been performed, and the plaintiff brings his action on the implied assumpsit, he may be met by that defence under the general issue. The rule must be absolute for a new trial. *Rule absolute.*

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## BUSSEY v. BARNETT.

IN THE EXCHEQUER, JANUARY 14, 1842.

[Reported in 9 Meeson & Welsby, 812.]

DEBT for goods sold and delivered, and on an account stated. The particulars of demand claimed the sum of £3 5s. 6d., being the balance of an account for goods sold and delivered by the plaintiff to the defendant. Pleas, except as to the sum of 4s. 6d., parcel, &c., *nunquam indebitatus*; as to that sum, a tender, which was denied by the replication. At the trial before the under-sheriff of Middlesex, it appeared that the action was brought to recover an alleged balance of a disputed

<sup>1</sup> 2 Ad. & E. 414; 4 Nev. & M. 182.

<sup>2</sup> 1 C., M. & R. 741.

<sup>3</sup> 2 C., M. & R. 547.

<sup>4</sup> *Cousins v. Paddon*, *supra*; *Grounsell v. Lamb*, 1 M. & W. 352.

would have been a good plea.  
Statute made pleading of  
gen'l issue in debt same as in  
gen'l assumpsit. On this ground  
the case is right though on  
principle wrong.

Goods sold & delivered & immediate  
payment.

Plea *nonquam in debitoribus.*

Held that the defense of im-  
mediate <sup>payment</sup> was admissible under  
the general issue pleaded. The  
trans action never created a  
debt. There was no promise  
to pay but immediate pay-  
ment.



Only agreement between the parties was to make an immediate exchange.

Can good law & correct.

account for goods bought by the defendant, for ready money, at the plaintiff's shop. The defendant produced evidence to prove that, within ten minutes after the delivery of the goods at his house, he paid for them in full, with the exception of the 4s. 6d., as to which the tender was pleaded. It was objected for the plaintiff that it was not competent to the defendant to give evidence of this payment, there being no plea of payment on the record; but the under-sheriff thought that, under the circumstances, no debt ever arose between the parties, and therefore the evidence was admissible under the plea of *nunquam indebitatus*, and he accordingly received it; and the tender being also proved to the satisfaction of the jury, the defendant had a verdict on both issues.

C. Jones now moved for a new trial, on the ground of misdirection, and contended that the defence was inadmissible without a plea of payment. [ALDERSON, B. The plea of *nunquam indebitatus* means that there never was a sale of goods to the defendant on credit. This was a mere exchange of goods for money, and no debt ever arose. LORD ABINGER, C. B. There was no contract whereby the defendant became indebted to the plaintiff.] In *Goodchild v. Pledge*, where to a count in debt for £20 for goods sold and delivered the defendant pleaded, that before the commencement of the suit, and when the said sum of £20 became due and payable, to wit, on, &c., the defendant paid the plaintiff the said sum of £20, according to the defendant's said contract and liability; this plea was held bad on demurrer for concluding to the country, and not with a verification; and Parke, B., there says, "The moment the goods are delivered, is there not a cause of action, throwing the proof of its discharge on the defendant?" And he adds, "The new general issue, that the defendant never was indebted, that is, at no instant of time, was framed for the express purpose of making all these defences pleadable by way of discharge." [ALDERSON, B. What the learned judge there means is, that the moment goods are delivered on credit a contract arises whereby the defendant becomes indebted. No doubt that was a proper case for a plea of payment.] This was a defence in the nature of confession and avoidance. } good.

LORD ABINGER, C. B. In this case the goods were not delivered upon a contract out of which a debt arose; there was no promise to pay, but immediate payment.

ALDERSON, B. Where there is a contract for the sale and delivery of goods for ready money, and ready money is paid, there is no debt.

GURNEY, B., concurred.

*Rule refused.*<sup>1</sup>

<sup>1</sup> *Wood v. Bletcher*, 4 W. R. 566, *accord*. Conf. *Littlechild v. Banks*, 7 Q. B. 739; *Timmins v. Gibbins*, 18 Q. B., 726; *Smith v. Winter*, 12 C. B. 489, *Baker v. Heard*, 5 Ex. 959. — ED.

*General Issue and Specific Traverses—(continued).*(c) TRESPASS.**KNAPP v. SALSBURY.****AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., Nov. 17, 1810.***[Reported in 2 Campbell, 500.]*

TRESPASS for running against the plaintiff's post-chaise, in which he was travelling along the highway, with a cart, and killing one of the horses drawing the post-chaise, by the shafts of the cart. Plea, not guilty.

The defence relied upon was, that the chaise and the cart were travelling on the road in opposite directions, and that the collision between them took place through the negligence of the plaintiff, or by mere accident, and without any default on the part of the defendant.

LORD ELLENBOROUGH. These facts ought to have been pleaded specially. The only thing to be tried under the plea of not guilty is whether the defendant's cart struck the plaintiff's chaise and killed his horse. That it did is now admitted; and the intention of the defendant is immaterial. This is an action of trespass. If what happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure the defendant is not liable; but as he in fact did run against the chaise, and kill the horse, he committed the acts stated in the declaration, and he ought to have put upon the record any justification he may have had for doing so. The plea denying these acts must clearly be found against him.

*Verdict for the plaintiff.<sup>1</sup>**Park and Knapp, for the plaintiff.**Jervis, for the defendant.***TORRENCE v. GIBBINS.****IN THE QUEEN'S BENCH, NOVEMBER 17, 1848.***[Reported in 5 Queen's Bench Reports, 297.]*

DECLARATION for that defendant, to wit, on, &c., and on divers other days, &c., debauched Josephine Amelia Torrence, the daughter of

<sup>1</sup> *Milman v. Dolwell*, 2 Camp. 378; *Boss v. Litton*, 5 C. & P. 408; *Pearcy v. Walter*, 6 C. & P. 282; *Hall v. Fearnley*, 3 Q. B. 919; *Cotterill v. Starkey*, 8 C. & P. 691; accord. — ED.

*Take up contrib. neg. pt. as well  
as acc. point.*

*Take up  
under Case - J  
at all.*

cf. with Gibbons v Pepper.

~~In that case Drft. was actor in the present case not.~~

In that case Drft. was not actor  
his act was was not his but  
wholly controlled. In this case  
was he act.

Action for seduction.

Special plea that person seduced  
was not servant of Ptf. De-  
murrer on ground that such plea  
was an argumentation not guilty.  
Held that plea was proper. Not  
guilty does not put in issue the  
service but the act of seduc-  
tion.

This is often called a plea to  
the matter of inducement.

plaintiff, "who during all the time aforesaid was, and still is, the servant of the plaintiff;" whereby she became pregnant, till she was delivered, &c.; special damage for loss of service, expenses, &c.<sup>1</sup>

Plea, "that the said J. A. Torrence was not the servant of the plaintiff, in manner and form," &c.

Demurrer, assigning for causes that the plea is argumentative and insufficient in this, to wit, that defendant, instead of simply pleading that he is not guilty of the grievances set forth in the declaration, hath denied the same in a circuitous and argumentative manner, by alleging that the said J. A. T. was not the servant of plaintiff; for, if J. A. T. was not the servant of plaintiff, defendant could not be guilty of the grievance set forth in the declaration; and for that the plea amounts to not guilty, and ought to have been pleaded in that form.

Joinder in demurrer.

*Atherton*, for the plaintiff. The fact of the service would be put in issue by a plea of not guilty. Such a plea puts the "wrongful act" in issue: R. Hil. 4 W. IV.; Pleadings in Particular Actions, IV. 1; that is, either the act or that which constitutes its wrongfulness. In trover, not guilty denies the conversion only, not the title; in an action for obstructing a right of way, the obstruction only, not the right; but in an action for a nuisance, it denies "that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation." [LORD DENMAN, C. J. There is no illegality if there be no annoyance.] Then to which class does this action belong? If there be no illegality independently of some particular fact, that fact is put in issue. The mere seduction of the daughter is, legally speaking, no injury. It is not like a trespass to the person of the plaintiff, which *prima facie* is an injury. It may be that, if the relation could have been formally alleged by way of inducement, the plea of not guilty would have admitted it; that is so in trover. But here the form of the declaration makes the relation the gist of the complaint. The whole action depends upon the resulting damage, to which the relation is essential. The case resembles *Sutherland v. Pratt*.<sup>2</sup> [LORD DENMAN, C. J. There, unless the contract was made with the plaintiff, the alleged contract was not proved.]

*Byles*, Serjt., *contra*. The relation is, in effect, mere inducement. The case is the same as if the declaration commenced by reciting that the plaintiff's daughter was his servant. The analogy of an action for obstructing a right of way applies. In *Taverner v. Little*, a declaration in trespass alleged that defendant was possessed of a cart and

<sup>1</sup> The recital of the summons did not state the form of action; there was no *vi et armis* in the body of the declaration.

<sup>2</sup> 11 M. & W. 296.

horse, and complained of injury done by negligent driving of them; and it was held that not guilty admitted that the cart and horse were in defendant's possession. That decision was acted on in *Hart v. Crowley*.<sup>1</sup> It is not true that the wrongfulness of the act is put in issue by not guilty; *Frankum v. The Earl of Falmouth* decides the contrary. *Holloway v. Abell*<sup>2</sup> is the only authority to be found in favor of the plaintiff: that was merely a decision at *Nisi Prius*; and the verdict there prevented the question from being raised *in banc*, as the jury affirmed the service. In an action for criminal conversation, not guilty would not put the marriage in issue.

*Atherton*, in reply. No attempt has been made to get rid of the distinction suggested between cases where the act is a *prima facie* cause of action, and those where the damage arising from a particular relation is the very gist of the action. That distinction explains all the authorities cited on the other side. Thus the obstruction of a way is *prima facie* an injury. But there is no legal injury in seduction, unless the relation of servant exist. [COLERIDGE, J. In an action for words injurious only in respect of the plaintiff's trade, not guilty does not put the trade in issue.] The example stated in the general rule as to an action for nuisance applies.

LORD DENMAN, C. J. It seems to me that the example is rather against you. No one can complain of an act that is not offensive at all. But, besides, the owner is the only person who can complain; his ownership is essential to the right of action; yet that is not traversed by not guilty. So here the seduction injures the plaintiff, because he is the master of the party seduced; and the same rule must be applied.

WILLIAMS, J., concurred.

COLERIDGE, J. I am of the same opinion. I may mention that Mr. Justice Littledale, before the New Rules, considered the service to be a necessary result of the residence of the daughter with the father. He once, in an undefended cause<sup>3</sup> in which I was counsel, where the residence was proved, held it unnecessary to give evidence of acts of service.

WIGHTMAN, J., concurred.

*Judgment for defendant.*<sup>4</sup>

<sup>1</sup> 12 A. & E. 378.

<sup>2</sup> 7 C. & P. 528.

<sup>3</sup> *Maunder v. Venn*, Moo. & M. 823.

<sup>4</sup> *Kenrick v. Horder*, 7 E. & B. 628, *accord*; *Holloway v. Abell*, 7 C. & P. 528; *Forman v. Dawes*, Car. & M. 127, *contra*. See *Eager v. Grimwood*, 1 Ex. 68. — Ed





Factum quare clausum fregit.

Plea - not the dwelling house of Plaintiff.

Held that Evidence was admissible tending to prove that P'ty. was wrongfully in house & that Def't. Entered by order of rightful owner.

Reason for case is that right of possession was formerly necessary. 1st case that made mere possession sufficient title 1 East. 212, Stephens, 24 W. 286.

Old forms long used.

With out doubt declaration alleged title in P'ty. as well as possession.

Def't. should have pleaded Confession & avoided answer per Wright's judgement.

## JONES v. CHAPMAN AND OTHERS.

IN THE EXCHEQUER CHAMBER, JUNE 18, 1849.

[Reported in 18 Law Journal Reports, Exchequer, 456.]

TRESPASS for breaking and entering the plaintiff's dwelling-house.

Plea, that the dwelling-house in the declaration mentioned was not at the time when, &c., the dwelling-house of the plaintiff, *modo et forma*; upon which issue was joined.

At the trial, which took place before Parke, B., at the summer assizes for the county of Denbigh, in 1845, that learned judge told the jury that they ought to find the issue for the defendant, if they were satisfied by the evidence on the part of the defendant that at the said time when, &c., one Harriet Middleton was entitled to the possession of the dwelling-house, and the defendant had committed the alleged trespass under her authority. To this direction the counsel for the plaintiff tendered a bill of exceptions to the effect that the learned judge should have directed the jury to find for the plaintiff, if they were satisfied by the evidence that at the time when, &c., he was in the actual possession of the dwelling-house. Upon the argument before this court,<sup>1</sup> on the 1st of December, 1847,

*Welsby* appeared on behalf of the plaintiff; and

*Peacock*, on behalf of the defendant.<sup>2</sup>

*Cur. adv. vult.*

The court differing in opinion, their Lordships now delivered their judgments *seriatim*.

WILLIAMS, J., after stating the facts of the case, proceeded as follows: In this case the general question is raised for our decision, as a court of error, whether under a traverse of the allegation in the declaration of trespass *quare clausum fregit*, that the close was the close of the plaintiff, the defendant is, or is not, at liberty to show title in himself or some other person, under whose authority he claims to have acted. I am of opinion that he is. I have not formed this opinion without hesitation, because it is in direct opposition to the judgment of the Court of Queen's Bench, in *Whittington v. Boxall*;<sup>3</sup> but on consideration of that judgment, and of the authority and reasoning on which it is founded, it appears to me to have been wrongfully given. The question turns on the construction of the New Rules of pleading

<sup>1</sup> Consisting of Wilde, C. J., Coleridge J., Coltman, J., Maule, J., Wightman, J., Erie, J., and V. Williams, J.

<sup>2</sup> The authorities cited on either side fully appear in the several judgments of their Lordships.

<sup>3</sup> 6 Q. B. Rep. 189; s. c. 12 Law J. Rep. n. s. Q. B. 818.

1834?  
of Hilary term, 4 Will. IV. Before those rules it had long been settled law that under the general issue of not guilty, in trespass *quare clausum fregit*, the defendant might give evidence of title in himself or in another by whose command he entered. The case of *Argent v. Durrant*<sup>1</sup> shows conclusively the establishment of this doctrine, and also discloses the principle on which it was grounded, namely, that the evidence falsified the declaration of the plaintiff, inasmuch as it proved that the defendant did not break the plaintiff's close, as the declaration set forth. Thus it appears at the time the New Rules were made the general issue in trespass *quare clausum fregit*, by reason of its traversing the allegation in the declaration, that the close in which, &c., was the close of the plaintiff, operated as a denial, not only of his possession, but also of his right of possession as against a defendant lawfully entitled thereto. But by the rule of Hilary term, 4 Will. IV., in trespass, it is ordered, "that in actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially." The alteration which this rule introduces appears to be this, that the defendant, if he intends to deny the plaintiff's possession, or right of possession, must, instead of denying it as heretofore by the general issue, deny it by traversing it specially. It must be confessed that the language employed in this rule is not very happily chosen, for the expression, "a special traverse," usually bears a particular technical sense, namely, that of a traverse containing an inducement and *absque hoc*, in which sense it is scarcely possible it could have been intended to have been used; and I understand that the rule in this respect is merely in order to enable the defendant to dispute, if he is the wrong-doer, the possession, or, if he claims title, the right of possession, — the allegation in the declaration, that the close in which, &c., is the close of the plaintiff, must be denied specially by a particular traverse, in contradistinction to being denied generally as heretofore, by the plea of not guilty. It is true that by the terms of the rule, taken literally, it is ~~not this~~ <sup>an</sup> allegation of the plaintiff's possession, or right to possession, which is to be traversed; but it is a principle of pleading that the defendant cannot traverse any matter which is not alleged or necessarily implied in the declaration, and the possession, or right of possession, is only alleged or necessarily implied in a declaration in trespass *quare clausum fregit*, as being included in the allegation that the close in which, &c., is the close of the plaintiff

<sup>1</sup> 8 Term Rep. 403.

Here liberum tenementum  
would have been held good  
in this case although it is a  
clear affirmative plea.

An affirmative & negative  
plea are never allowable  
to same point.

This case overruled *Whittington v.*  
<sup>S.A.B. 139</sup> *Bozall* which was correct. *Libertum tenementum*  
was allowed *Henry v. Brydget*  
yet that was an affirma-  
tive plea setting up title in  
defect. Case clearly wrong.

Procession only is necessary  
in the par 9. C. 7. 2 New. C. 98; 12  
A.C. 624; 1 East 212.

From for a deed.

By Pltff's agent on Mary gave  
and assigned to Deft the deed  
in question as security for cer-  
tain money. Pltff. demanded  
it & Deft. refused possession.

Itld that Pltff. must have  
right to immediate posses-  
sion & that the second issue  
that Pltff was not possessed  
as of his own property puts in  
issue <sup>right to</sup> possession as well as  
property.

A. for Deft.

If this be so, then the defendant in the present case, inasmuch as by the plea in question he has denied the plaintiff's allegation that the dwelling-house in which, &c., was his dwelling-house, must be considered as specially traversing the plaintiff's right to possession thereof, and is therefore within the meaning of the New Rules. He has put himself in the same situation as that in which he would have been before the New Rules, if he had traversed it generally by pleading not guilty, and he is consequently at liberty to show title in himself or in another, under whose authority he acted. For these reasons, I am of opinion that the judge's direction at the trial was correct, and that our judgment on this writ of error ought to be for the defendant.<sup>1</sup>

*General Issue and Specific Traverses — (continued).*

(d) TROVER

OWEN v. KNIGHT.

IN THE COMMON PLEAS, NOVEMBER 18, 1837.

[Reported in 4 Bingham's New Cases, 54.]

THE plaintiff declared in trover that he was possessed, as of his own property, of a certain indenture bearing date the 7th of November, 1830, between R. Sadler of the one part, and S. Feary of the other, by which Sadler demised to Feary a certain messuage therein described, and complained of the defendant having converted this deed to his own use.

<sup>1</sup> Wilde, C. J., Erle, J., and Coltman, J., delivered opinions substantially coinciding with that of Williams, J. Maule, J., concurred with the majority in their conclusion, though not in their reasoning. "I agree with the exception of the plaintiff in error that the question raised by the issue of not possessed is, whether the plaintiff was in actual possession or not; but it seems to me that as soon as a person is entitled to possession and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by the command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who so entered." Coleridge, J., and Wightman, J., delivered dissenting opinions, on the ground that the plea of not possessed put in issue only the actual possession of the plaintiff; Coleridge, J., taking the view that a defendant who wished to put in issue the plaintiff's right of possession, must resort to a distinct specific traverse to that effect; while Wightman, J., thought that a defendant who relied on right of possession either in himself or some third person under whom he acted, should plead such right of possession by way of confession and avoidance. The full opinions have been omitted on account of their length. — Ed.

Williamson  
thinks this  
view  
right.

The defendant pleaded, first, not guilty; and, secondly, that the plaintiff was not, at the time when, &c., possessed, as of his own property, of the indenture in the declaration mentioned.

Upon which pleas<sup>1</sup> issue was joined.

At the trial before Vaughan, J., it appeared that the defendant, in answer to a formal demand on the part of the plaintiff, refused to give up the deed, and one Feary, who was called as a witness, proved that the deed was delivered to the defendant, with the plaintiff's assent, to raise money for the discharge of a bill on which he and Feary were both liable.

The learned judge told the jury that, if Feary were believed, their verdict ought to be for the defendant.

A verdict having been found for the defendant accordingly,

*Talfourd*, Serjt., moved for a new trial, on the ground of misdirection.

A rule *nisi* having been granted,

*Bompas*, Serjt., and *Godson*, showed cause.

They cited various authorities to show that in trover the plea of not guilty puts in issue the property of the plaintiff, as well as the conversion by the defendant; but upon this point the court abstained from pronouncing any opinion.

On the second plea, they contended that the defendant was entitled to retain his verdict; for admitting the property in the deed to be in the plaintiff, he was not possessed of it, or entitled to the possession of it, at the time of the action; and to maintain trover he must show a right to the possession as well as the property.

But after having authorized Feary to assign the deed to the defendant as a security for money advanced, he could have no claim to the possession till that money was repaid.

*Talfourd* and *R. V. Richards*, in support of the rule, contended that the defendant, having refused absolutely to deliver the lease, and not conditionally, till payment of the sum due to him, had been guilty of a wrongful conversion within the terms of the first issue; and that the plaintiff being possessed of the house to which the deed related, was, in point of law, possessed of the deed as of his own property under the terms of the second issue.

TINDAL, C. J. It is unnecessary for us to give any opinion as to what was matter of proof under the first issue, because the question here turns on the second issue only. This is an action of trover for the conversion of a lease, and the declaration, according to the usual form pursued in actions of trover, alleges that the plaintiff was lawfully possessed of the deed as of his own property.

<sup>1</sup> A portion of the case relating to a third plea has been omitted. — Ed.

~~Not guilty doesn't admit~~  
~~anything.~~ At this time  
not guilty supposed to deny  
an actual confession, not  
the wrongfulness of it.





The defendant joins issue on that precise proposition: the question therefore is, whether on that issue so raised the facts proved will give the verdict to the plaintiff or to the defendant. The action of trover only lies where the plaintiff has the right to possession, as well as a legal property in the subject of the suit. That was established by the case of *Gordon v. Harper*,<sup>1</sup> which decided that where goods, leased as furniture with a house, had been wrongfully taken in execution by the sheriff, the landlord could not maintain trover against the sheriff pending the lease, because, to maintain such an action, he must have the right of possession as well as the right of property at the time.

The plaintiff here was originally entitled to the possession, and had a legal property in the deed in question; but it was afterwards delivered to the defendant, with the plaintiff's assent, to raise money for the discharge of a bill on which he and Feary were both liable.

The parties therefore stand in this position, that the plaintiff is entitled to the property in this deed, but entitled to the possession only when the money advanced by the defendant has been repaid. The defendant is entitled to hold possession till he has been repaid. On the second issue, the verdict for the defendant cannot be impeached.

VAUGHAN, J. The deed is in the defendant's hands, with the plaintiff's assent, upon an advance of money by the defendant; and the plaintiff is not entitled to the possession till the money has been repaid. The defendant had a right to set up his lien, and that shows that the plaintiff is not entitled to possession. The cases of *White v. Gainer*<sup>2</sup> and *Boardman v. Sill*<sup>3</sup> show that the defendant does not waive his lien, because he omits to mention it.

BOSANQUET, J. I agree that the defendant is entitled to retain the verdict on the second issue. There is an express traverse of the plaintiff's possession, and the facts show that the deed was deposited with the defendant by the authority of the plaintiff, on a condition which has not been observed.

COLTMAN, J. I think that under the second issue the right to possession is raised as distinct from the right to property; and that the verdict for the defendant, on that point, ought not to be disturbed.

*Rule discharged.*<sup>4</sup>

<sup>1</sup> 7 T. R. 9.

<sup>2</sup> 2 Bing. 23.

<sup>3</sup> 1 Campb. 410, n.

<sup>4</sup> *Leake v. Loveday*, 4 M. & G. 972; *Isaac v. Belcher*, 5 M. & W. 189; *Nicolls v. Bastard*, 2 C., M. & R. 659; *Gregg v. Wells*, 10 A. & E. 90; *Chase v. Goble*, 2 M. & G. 980; *Webb v. Tripp*, 1 Dowl. n. s. 589; *Ringham v. Clements*, 12 Q. B. 260 accord. — Ed.

## WHITE v. TEALE.

IN THE QUEEN'S BENCH, JUNE 11, 1840.

[Reported in 9 *Law Journal Reports*, *Queen's Bench*, 877.]

TROVER for wearing apparel and other goods. Plea, not guilty.

At the trial, before Lord Denman, C. J., at the London sittings after Trinity term, 1838, it appeared that in December, 1837, the defendant let lodgings to the plaintiff in the Strand, which he occupied until the 17th of January following, when he left for Bath, leaving some rent unpaid, and also some boxes, containing wearing apparel and other things, which he gave into the custody of the defendant. A dispute subsequently arose as to whether the rent was £2 per week or £2 5s. A tender at the rate of £2 per week was proved, and a demand of the goods, which the defendant refused to give up, saying, that he claimed a larger sum, and that he must have the plaintiff's authority. He also said that he should sell the things. A written authority from the plaintiff to deliver them up was afterwards sent to the defendant, but he still refused to restore them. For the defendant, his servant proved that, the day before the plaintiff left to go to Bath, he said to the defendant, "Now, Mr. Teale, I leave these boxes in your care till such time as I pay the rent." The Lord Chief Justice being of opinion that this evidence ought not to be admitted under the plea of not guilty, directed a verdict to be entered for the plaintiff, giving the defendant leave to move to enter a verdict for him. A rule having been obtained accordingly,

*Kelly* and *Bagley* showed cause, in last Easter term, and contended that, upon the plain terms of the New Rules, the evidence was not admissible under the plea of not guilty; by which plea the title of the plaintiff, which consists of property in the goods, and a right of possession at the time of bringing the action, is admitted: that the conversion was the only thing in issue; and that any contravention of the plaintiff's title, by a lien or otherwise, could only be questioned by traversing the plaintiff's possession, as alleged in the declaration: that no case had decided that a lien, which was a temporary denial of the title of the plaintiff, could be given in evidence under not guilty; though in *Stancliffe v. Hardwick*,<sup>1</sup> the Court of Exchequer cautiously abstained from saying that it might not. They cited *Isaac v. Belcher*,<sup>2</sup> *Barton v. Brown*,<sup>3</sup> *Samuel v. Duke*,<sup>4</sup> *Frankum v. Falmouth*, *Owen v. Knight*,

<sup>1</sup> 2 Cr., M & R. 1.<sup>2</sup> 5 Mee & Wels. 298<sup>3</sup> 5 Mee. & Wels. 189.<sup>4</sup> 8 Mee. & Wels. 622.

From for certain clothes.

Plea - not guilty.

Def. offered evidence to rebut evidence of demand & refusal that Plf. had given Def. a lien on goods. Held inadmissible.

Under the plea of not guilty the property & right of possession are admitted to be in Plf. Evidence of a lien would be contradictory to the admitted right to possession. The Def. must traverse the possession if he intend to introduce evidence of a lien.

see 2 C.M.R. 1.  
held that in favor "not guilty"  
merely denied act.

Young v Cooper decided that  
the wrongfulness was in  
issue under "not guilty".

Later view had see notes  
opposite h.64

Com. Law Procedure Act  
has virtually done away  
with importance of di-  
stinction. How? look up.

~~after act, under "not possessed"~~  
~~the deft. could show anything~~  
~~he could show under "not~~  
~~guilty" ?~~

Act established a general  
denial which included  
most everything.

Scarfe v. Morgan,<sup>1</sup> Vernon v. Shipton,<sup>2</sup> Davies v. Nicholas,<sup>3</sup> Weedon v. Aldridge.<sup>4</sup> Many of the above cases were also cited upon the point of what was a sufficient conversion to enable the plaintiff to recover under not guilty; but the judgment proceeded entirely upon the inadmissibility of evidence to show a lien, where the only plea was the general issue. Upon the point as to the conversion, Littledale, J., referred to Stransham's Case.<sup>5</sup>

*Platt*, contra, contended that although an actual conversion, as by sale or detention of the goods upon demand, after satisfying the full rent, might not be admissible under the plea of not guilty, yet that the defendant was not precluded from showing a very different state of things, namely, that the goods were in his possession by the consent of the plaintiff himself, until he should do a certain act, which he had not done; that the case of *Owen v. Knight* did not decide that such a defence might not be shown under the general issue, although it was equally admissible under a plea denying the right of possession of the plaintiff. *Weedon v. Aldridge* is in favor of the defendant.

[*PATTESON, J.* It seems that *Stransham's Case*, from *Cro. Eliz.*, was not cited there: that case shows that conversion *ex vi termini* means a wrongful conversion. *LORD DENMAN, C. J.*, referred to *Dee v. Bacon*.<sup>6</sup>]

In all the cases cited the conversion was a wrongful one; but this is distinguishable from them upon that ground. He cited *Allen v. Harris*,<sup>7</sup> *Hartford v. Jones*,<sup>8</sup> *Williams v. Gesse*.<sup>9</sup> *Cur. adv. vult.*

The judgment of the court was now delivered by

*LORD DENMAN, C. J.* This was an action of trover for a box of clothes; plea, not guilty. At the trial, after the plaintiff had given evidence of a demand and refusal, the defendant offered to prove that the goods were placed in his hands by the plaintiff, to be kept till payment of certain rent, which, it was said, never had been paid. I refused to allow that evidence, thinking it inadmissible under the plea of not guilty. A rule for a new trial, upon the rejection of the evidence, has been fully argued and considered, and the court are of opinion that the evidence was not admissible. That plea, by the New Rules, denies only the conversion, and admits the title. Now that title consists of the right of property, and the right of possession at the time of the alleged conversion. *Gordon v. Harper*.<sup>10</sup> But a lien is inconsistent with, and negatives, the plaintiff's right to possession. If, therefore, proof of that were admitted under the plea of not guilty, the defendant would be allowed to give in evidence at the trial a nega-

<sup>1</sup> 4 Mee. & Wels. 268.

<sup>4</sup> 1 Per. & Dav. 657.

<sup>7</sup> 2 Lutw. 1587.

<sup>10</sup> 7 Term Rep. 9.

<sup>2</sup> 2 Mee. & Wels. 9.

<sup>5</sup> Cro. Eliz. 98.

<sup>8</sup> 2 Salk. 654.

<sup>3</sup> 7 Car. & Pay. 839.

<sup>6</sup> Cro. Eliz. 435.

<sup>9</sup> 8 Bing. N. C. 849.

tion of that matter which he has, by his plea, admitted on the record. He ought to have traversed that the plaintiff was possessed, as of his own property, in manner and form as alleged in the declaration, by which he would have put in issue the plaintiff's right of possession, as was held in *Owen v. Knight*, and would have been entitled to prove the lien, in order to negative that issue. The case of *Stancliffe v. Hardwick* was cited, where the Court of Exchequer, in giving judgment, guarded itself against being supposed to decide that a lien might not be given in evidence under a plea of not guilty, to answer a demand and refusal proved by the plaintiff as evidence of a conversion. The court did not there decide that a lien might be given in evidence under the plea of not guilty, but used the expression alluded to solely for the purpose of leaving that question entirely open. Some matters were spoken of in the course of the argument, which it is not necessary to advert to under this view of the case, and the rule must be discharged.<sup>1</sup>

*Rule discharged.*<sup>1</sup>

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*General Issue and Specific Traverses — (continued).*

(c) DETINUE.

RICHARDS v. FRANKUM.

IN THE EXCHEQUER, EASTER TERM, 1840.

[Reported in 6 Meeson & Welsby, 420.]

THIS was an action of detinue for a promissory note. The defendant pleaded, first, *non detinet*; secondly, that the plaintiff was not possessed of the note; thirdly, that before the commencement of the suit, the plaintiff, for a good and valuable consideration, assigned and delivered the said promissory note to one John Granger, to be by him held as and for his own note; and that the said John Granger, before the commencement of this suit, delivered the said note to the defendant, to be by him held for and on the behalf and for the use and benefit of the said John Granger; and that the defendant, as the servant and by the command of the said John Granger, detained and still detains the said promissory note, as he lawfully might for the causes aforesaid.

The replication traversed the assignment and delivery of the note by the plaintiff to Granger, and the delivery by him to the defendant.

<sup>1</sup> *Barton v. Brown*, 5 M. & W. 298; *Jones v. Davies*, 6 Ex. 663, *accord.* — ED.

At first ~~detinue~~ detinue only lay  
when there had been a bail-  
ment & a wrongful detainer  
beyond bailment. Later any  
wrongful detainer would ~~now~~  
support detinue.

See over

Detinue on a promissory note.

Plead: 1. Non detinet, 2. not possessed.  
3. Assignment to one Granger  
who assigned to Deft.

Verdict for Deft. on 2nd & 3rd ~~pleads~~ <sup>counts</sup>.  
~~for Plt. on first.~~

Judge gave leave to move Court  
for verdict on 1st count, if the proof  
of the two others was admissible  
under the 1st.

Should not be admissible. Non detinet  
puts in issue merely the act of de-  
fendant & defendant's possession in  
Plt.

Rule refused.

Like old decision in *Trom* but against  
Young Cooper. Old decision better & this  
in accordance with spirit of New Rule



~~Whitaker v. Stewart~~

Walker v. Jones, 89, held that allegation of bailment in detinue is merely formal & cannot be traversed. Always in detinue was fictitious as in trover. There was a formal declaration of bailment - mere form.

Where fictitious declaration represents true state of facts pleading cannot be accurate.

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To bring in idea of wrongfulness mixes up law and fact.

This decision sound.

At the trial before Gurney, B., at the last assizes for the county of Oxford, the jury found a verdict for the defendant on the second and third issues; the learned judge giving the defendant leave to move to enter a verdict on the issue on the plea of *non detinet* also, if the court should be of opinion that the matters of defence so found in his favor were evidence in support of that issue.

*Ludlow*, Serjt., now moved accordingly. The jury, by finding on the second and third issues for the defendant, have found that the promissory note was not the property of the plaintiff, and so established the plea of *non detinet*, which puts in issue the wrongful holding and detaining of the note by the defendant. It is evident from the use of the words, "which he unjustly detains," in the original writ and declaration, that the unjust detention is the gravamen of the complaint, and that is therefore put in issue by the plea of *non detinet*, notwithstanding the New Rules. Whatever may be the effect of the New Rules as to pleading specially matter of excuse, the unjust detention is the gravamen of the charge in the declaration; and as that is a material allegation in it, and is traversed by the plea, and the finding of the jury on the other issues establishes that there was no unjust detention, the verdict ought therefore to be entered for the defendant.

LORD ABINGER, C. B. There is no ground whatever for this motion. It is true that a party who brings an action of detinue brings it for the unjust detention of his property; but where the detention is justified, the matter must be set out on the record. The only issue on *non detinet* is upon the fact of the detainer. If the party has a lawful excuse for the detainer, he must plead it.

PARKE, B. There is no ground for this application. Under the plea of *non detinet* a defendant might, at common law, prove that the goods were not the property of the plaintiff; but if he had a lawful excuse for the detention, as if the goods were pawned or pledged to him for money which was not repaid, he was bound to plead it. Co. Lit. 283 a. Lord Coke there says, "In detinue, the defendant pleadeth *non detinet*; he cannot give in evidence that the goods were pawned to him for money, and that he is not paid, but he must plead it; but he may give in evidence a gift from the plaintiff, for that proveth that he detaineth not the plaintiff's goods." But it is perfectly clear that, since the New Rules, the defendant cannot give in evidence, under the plea of *non detinet*, that the goods were not the property of the plaintiff: so that, in any view of the case, the matters proved in support of the second and third pleas were not evidence under the first. If the object be to show that the chattel is not the property of the plaintiff, that cannot be done under such a plea since

the New Rules. If the object be to show that the detention was lawful, and the party had a good excuse for detaining the property, then, according to the authority of Lord Coke, such a defence ought to be pleaded, even at common law. Under the plea of *non detinet*, the fact of detention is alone in issue.

ALDERSON, B. In an action of trover, the plea of not guilty puts in issue the mere fact of the conversion, and so under the issue of *non detinet* the fact of the detention is alone in issue.

ROLFE, B., concurred.

*Rule refused.*

### LANE v. TEWSON.

IN THE QUEEN'S BENCH, NOVEMBER 10, 1841.

[Reported in 1 Gale & Davison, 584.]

DETINUE of goods. Plea, that the said goods, &c., were not the goods of the plaintiff.

At the trial before Parke, B., at the last assizes for the county of Lincoln, the defendant contended that he had a lien upon the subject of the action for his charges as an auctioneer. It was objected, on the part of the plaintiff, that this defence was not admissible under the plea. The learned Baron reserved leave to the plaintiff to move to enter a verdict for him on this objection, if the opinion of the jury should be adverse upon the question, which he left to them, of the fact of the lien. The jury having found a verdict for the defendant,

*Balguy*<sup>1</sup> now moved to enter a verdict for the plaintiff, pursuant to leave reserved. He cited *Richards v. Frankum* as an authority that in detinue a lien must be specially pleaded. *Cur. adv. vult.*

LORD DENMAN, C. J., now delivered judgment. The question in this case was, whether in detinue, under a plea denying that the goods were the plaintiff's, a lien could be set up. We think that the learned judge ruled rightly that it might. A similar point has been already decided in an action of trover. *Rule refused.*<sup>2</sup>

<sup>1</sup> On Friday, November 5, before Lord Denman, C. J., Williams, Coleridge, and Wightman, JJ.

<sup>2</sup> *Mason v. Farnell*, 12 M. & W. 674, *contra*. But see *Dirks v. Richards*, 4 M. & G. 574; *Barnes v. Williams*, 7 M. & G. 408.—Ed.

Case numbered 12 M.V.W. 674, later.  
Lien must be specially pleaded  
6 D.B. 423, necessity of title.  
If P'ty. own a finder he might  
maintain detinue. Plea de-  
minable in such cases.

---

Detinue for goods.

Plea not possessed.

Evidence offered of a lien & al-  
lowed by judge.

On reception to this ruled that it  
is admissible.

% Over & Knight. acc.

---

If there is a contract to redeliver  
the title of goods is immaterial.  
Bailee is bound to deliver to  
person from whom he received  
them except true owner demand  
them. The plea here is im-  
material if a case of bailment but  
if P'ty. relies on his title to goods  
not possessed in good.

Replevin.

Verdict - rent in arrears to Christmas  
in a certain lease rent being re-  
ceived quarterly

Plea: No rent in arrears.

Pltf. offered evidence that rent  
was received semi annually &  
not quarterly & that none was  
due at Christmas.

Held: Such evidence is inad-  
missible. No rent in arrears  
admits Def't's holding just as  
set forth with rent payable  
quarterly & evidence contra-  
dicting that is not admis-  
sible under that plea.  
Tendency & uphold denial strictly to fact denied.

Replevin - non cepit pleaded.

Held that this does not put in  
issue Pltf's right of property  
but merely taking & hence Pltf.  
can recover without proving  
property.

*General Issue and Specific Traverses — (continued).*

(f) REPLEVIN.

## HILL v. WRIGHT.

AT NISI PRIUS, CORAM BULLER, J., JULY 15, 1798.

[Reported in 2 Espinasse, 669.]

THIS was an action of replevin.

The defendant, by his avowry, stated that the plaintiff held of him certain premises, the rent whereof was reserved quarterly, and then avowed for a quarter's rent in arrear to Christmas, 1797.

Plea in bar to the avowry. No rent in arrear.

The counsel for the plaintiff stated his case to be, that he held under a lease from the defendant's father, under whom the defendant claimed; which lease he had ready to produce, but in which the rent was reserved half yearly, and not quarterly, as the defendant had avowed.

BULLER, J. The plaintiff cannot go into that evidence on these pleadings.

*Shepherd*, Serjt., contended that it could. That the issue was, that there was no rent in arrear on the day stated in the avowry. No rent was by law due till the days on which it was reserved and made payable; and, by the lease, those days were Michaelmas and Lady-day; so that no rent was in arrear at Christmas, on which day the defendant avowed, no rent being then due or payable.

BULLER, J. *Riens en arriere* admits the title of the defendant as stated in the avowry. The holding, therefore, must be taken to be a holding reserving the rent quarterly. The plaintiff might have, by his plea in bar, denied the holding. He has not done so, but chosen to take issue only on no rent being in arrear at Christmas, 1797. Unless, therefore, he can show that he has paid the rent up to that time, the defendant must have a verdict.

The plaintiff having no evidence to that effect, the defendant had a verdict.

## DOVER v. RAWLINGS.

AT NISI PRIUS, CORAM TINDAL, C. J., FEBRUARY 15, 1844.

[Reported in 2 Moody &amp; Robinson, 544.]

REPLEVIN. Plea, *non cepit*, and issue thereon.

The plaintiff proved a seizure of the goods by the defendant, but

failed in proving any property in them, or that at the time of the seizure they were in his (the plaintiff's) possession.

*Channell*, Serjt., objected that upon the issue joined it was necessary for the plaintiff to show himself in possession of the goods. The New Rules had introduced no alteration in the pleadings in replevin, and before those rules *non cepit* put the property in issue.

TINDAL, C. J. I agree that the New Rules do not apply to this form of action; but I find that in Comyns's Digest a plea is given expressly denying the property, and I think that the plea of *non cepit* would not, according to the old course of pleading, put the plaintiff on proof of the possession.<sup>1</sup> *The plaintiff accordingly had a verdict.*

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*General Issue and Specific Traverses — (continued).*

(g) CASE.

FRANKUM v. THE EARL OF FALMOUTH AND ANOTHER.

IN THE KING'S BENCH, JANUARY 14, 1835.

[Reported in 2 Adolphus & Ellis, 452.]

CASE. The declaration alleged that whereas the plaintiff, at, &c., was possessed of a certain water grist-mill, with the appurtenances, situate, &c., and by reason thereof, before and at, &c., of right ought to have had and enjoyed, and still of right ought, &c., the benefit and advantage of the water of a certain stream or watercourse in, &c., which during all those times of right ought to have run and flowed, and until the division thereof hereinafter mentioned of right had run and flowed, and been used and accustomed to run and flow, and still of right ought to run and flow, unto the said mill of the said plaintiff, to supply, &c.; yet the defendant well knowing, &c., but contriving, &c., whilst the said plaintiff was so possessed of his said mill, with the appurtenances, to wit, &c., in, &c., and higher up the said stream or watercourse than the said mill of the said plaintiff, wrongfully and injuriously diverted and turned, and caused to be diverted, &c., divers large quantities of the water of the said stream or watercourse from and out of the usual, accustomed, and proper course and channel thereof, and away from the said mill, and also hindered, &c., and prevented a large part of the

<sup>1</sup> See Com. Dig. Pleader, 3 K. 11.

|            |                                                    |
|------------|----------------------------------------------------|
| Plea,      | } End pleadings<br>in<br>replevin.<br>Distinguish. |
| Commaiser  |                                                    |
| Cognizance |                                                    |
| Avowry     |                                                    |

Avowry = own right.

Cognizance = another's right.

Trespass on the case for diverting water "wrongfully & evilfully" from a certain mill stream. Plea <sup>to</sup> <sup>id</sup> <sup>as</sup> <sup>the</sup> not guilty. Evidence showed that mill had not been located 20 yrs. thence. Pltf. had no right of action. Held that this was not evidence under not guilty, which admitted everything but the diverting. Wrongful means diverting without lawful cause only. J. for Pltf. for tortious without damage.



Not guilty puts in issue the diversion of water sufficient to injure lower mill.

---

Allegation of mill is essential in two aspects. Mill is matter of inducement to Pltff's right to sue. & necessary to determine whether the Deft. did the act.

Perhaps <sup>the lack of a</sup> mill could be proved under "not guilty" or not possessed of right.

---

Yould, #14, says cannot plead to the plaintiff's right (as a right of way) but may show lack in evidence. Of course before rule & so perhaps means that general issue covers it.

water of the said stream or watercourse from running or flowing in or along its usual, accustomed, and proper course and channel to the said mill, and from supplying the same with water for the necessary working thereof, as the same ought to have done, and otherwise would, &c., and by reason thereof, &c.

First plea, not guilty.<sup>1</sup>

On the trial before Alderson, B., at the Berkshire summer assizes, 1834, the act of diverting the water was admitted; but the plaintiff did not show that the mill was an ancient one, or that the water had been used for it so long as twenty years, it having in fact been erected about fourteen years before the act complained of. The learned judge then directed that the verdict should be entered for the defendant.

In Michaelmas term last,<sup>2</sup> *Justice* moved for a rule to show cause why the plaintiff should not have judgment on the first issue, contending that the act done was the only matter put in issue by that plea, and was admitted by the defendants. The court granted a rule to show cause why judgment should not be so entered, without damages, and, in the present term (Monday, January 12),<sup>3</sup>

*Talfourd*, Serjt., and *R. V. Richards*, showed cause. The fair way to try the question is, to suppose this first the only issue on the record. If the words "wrongfully and injuriously" had been left out of the declaration, it would have been demurrable. Therefore, those words are material; and, that being so, the general issue puts the wrong and injury in issue; and these are disproved, since the only wrong and injury alleged are in respect of the possession of the mill, which, as it now appears, did not support the claim. Suppose the defendant had shown that no mill had ever existed, would the plaintiff have been entitled to judgment on this issue? [PATTESON, J. On this issue, I should not have received evidence that the mill did not exist. The plea of not guilty admits its existence.] In *Wyatt v. Harrison*<sup>4</sup> the court considered it necessary to prove a legal injury as well as the fact charged, though the words "wrongfully and injuriously" do not appear to have occurred as here. [LITLEDAL, J. "Wrongfully" means "without lawful cause." LORD DENMAN, C. J. It is a challenge to the defendant to show lawful cause. PATTESON, J. Would not your argument go the length of dispensing with special pleading, under the New Rules?] This is not like a title set forth in the inducement, which

*such words  
cannot aid  
it & it is  
demurrable.*

*? as to this.*

<sup>1</sup> Only so much of the case is given as relates to the issue raised by this plea.  
— Ed.

<sup>2</sup> November 18. Before Lord Denman, C. J., Taunton, Patteson, and Williams, JJ.

<sup>3</sup> Before Lord Denman, C. J., Littledale and Patteson, JJ.

<sup>4</sup> 8 B. & Ad. 871

would be admitted on this plea: the allegation contains the very cause of the action. The rule, Hil. 4 W. IV., Pleadings in Particular Actions, IV. 1, shows only that the plea would not be a denial of "facts stated in the inducement," which words explain and limit the preceding, "denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant." [PATTERSON, J. You should take all together: what do you say of the second rule as to actions on the case?] That raises the same question, whether the declaration complains of any injury except that to the mill. Thus, the general issue in slander appears, by the first rule as to actions on the case, to deny the speaking of the words "maliciously, and in the sense imputed."

*Curwood* and *Carrington*, contra. The general issue now puts in issue nothing but the fact of the diversion. The word "wrongfully" imports, at the most, no more than a reference to the inducement, as explaining how the wrong arose, and is not traversed by any plea which does not traverse the inducement; if the act be not wrongful, that should be pleaded. The second rule as to actions on the case requires that matter in confession and avoidance shall be specially pleaded. Even if there were no mill at all, the plaintiff must have succeeded on this issue.

*Per Curiam*. We will confer with all the judges, in order that there may be a uniformity of practice on this point.

*Cur. adv. vult.*

On this day LORD DENMAN, C. J., said: We have conferred with the other judges, and we have determined that the word "wrongfully" does not put the title in issue. The judgment will therefore be entered for the plaintiff, without damages, on the first issue.

*Rule absolute*<sup>1</sup>

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### THOMAS v. MORGAN.

IN THE EXCHEQUER, TRINITY TERM, 1835.

[Reported in 2 Crompton, Meeson, & Roscoe, 496.]

CASE. The declaration stated that the defendant theretofore, to wit, on the 1st day of September, 1833, and from thence for a long

<sup>1</sup> *Raine v. Alderson*, 4 B. N. C. 702; *Bacon v. Smith*, 1 Q. B. 846; *Grenfell v. Edgcome*, 7 Q. B. 661; *Renshaw v. Bean*, 18 Q. B. 112; *Needham v. Fraser*, 1 C. B. 815; *Couling v. Cox*, 6 C. B. 708, accord. — ED.

Case.

Declaration that ~~Def's~~ dogs, he well knowing their bad disposition, bit & injured Pltf's Cattle.

Plea: 1. Not guilty. 2. No dogs or dog<sup>g</sup> did injure bit, Pltf's Cattle.

The Scienter of Pltf. was not sufficiently proven in C's opinion.

Held that not guilty puts that in issue & hence does not admit it & therefore it not being proved the Pltf. fails. It is not matter of inducement & hence admitted but material to the Commission of the act.

In Case

Not guilty does not deny  
wrongfulness - being matter  
of law. This principle de-  
parted from in *Frost* (see  
*Young v. Cooper*) and to some  
Extent in *Dexter*.

Not guilty denies though the  
whole act which is wrong  
ful as the Plf. claims.

Scienter, not admitted  
in this case.

2nd Plea - Supposed to be

It is included in general  
issue & hence should have  
~~it in the 1st plea~~  
been so pleaded.

Penalty of pleading uncer-  
tainly was to pay costs  
in issues which pleader loses.

space of time, to wit, until and at the time of the damage and injury to the said plaintiff as thereafter mentioned, wrongfully and injuriously did keep divers, to wit, ten dogs, he, the said defendant, during all that time well knowing that the said dogs then were of a ferocious and mischievous disposition, and used and accustomed to attack, chase, bite, worry, and kill cattle; which said dogs afterwards, to wit, on, &c., and on divers other days, &c., did attack, chase, bite, worry, and kill divers, to wit, ten bulls, ten cows, ten oxen, ten heifers, and ten steers, of the said plaintiff, of great value, to wit, of the value of £100, by means whereof, &c.

Pleas: first, not guilty; secondly, that no dogs or dog of him, the defendant, did attack, chase, bite, worry, or kill any bull, cow, ox, heifer, or steer of the said plaintiff, in manner and form, &c.

The cause was tried before Williams, J., at the last spring assizes for the county of Carmarthen, when it was proved that the defendant's dogs had killed some of the plaintiff's sheep. It was also proved that these dogs had worried the cattle of other persons, and were of a ferocious disposition; and that when the defendant was told that his dogs had killed the plaintiff's sheep, he promised to settle for the damage, provided it were clearly proved that they had done it. A witness of the name of Protheroe also proved that the defendant's dogs had worried his cattle, and that when he complained of it to the defendant, he said he could not help it, and that he had ordered his dogs to be kept up. This, it appeared, was on the 15th of September, the plaintiff's sheep having been bitten two or three days before. It was objected that there was not sufficient evidence of the *scienter* to render the defendant liable; and the learned judge being of that opinion, nonsuited the plaintiff, but gave him leave to move to enter a verdict for the sum of £11 10s., the value of the cattle, if the court should be of opinion that there was sufficient evidence of the *scienter*.

*Chilton*, in Easter term last, moved accordingly, on two grounds: first, that it was not necessary to prove the *scienter*, it being admitted on the record; and, secondly, that there was evidence of it to go to the jury

The second plea is, that the dogs did not bite the plaintiff's cattle, but that was clearly proved; the learned judge, however, thought that the *scienter* was not proved; but that, it is submitted, was admitted on the record. Since the New Rules, all that is put in issue by the plea of not guilty is, whether or not the act complained of was done. The rule of Hilary term, 4 W. IV., is, that "in actions on the case, the plea of not guilty shall operate only as a denial of the breach of duty or wrongful act alleged to have been committed

by the defendant, and not of the facts stated in the inducement." [LORD ABINGER, C. B. The *scienter* is no inducement; it is the substance of the issue.] It was held in *Frankum v. The Earl of Falmouth*, that, under the rules of Hil. 4 W. IV., the plea of not guilty, to a declaration in case, for the wrongful diversion of water from the plaintiff's mill, puts in issue the mere fact of the diversion, and not its wrongful character. That shows that all that the general issue denies is the act done; and therefore, under the general issue in this case, the only matter in dispute is, did the defendant's dogs worry the plaintiff's cattle?

LORD ABINGER, C. B. In *Frankum v. The Earl of Falmouth*, the diversion was the injury complained of, and the court held very properly that the plea of not guilty put in issue the mere fact of the diversion, and not the right to divert. Here, the *scienter* is no inducement; it is a part of the cause of action. If it was proved that the defendant's dogs did bite the plaintiff's cattle without the defendant's knowledge of their propensity, he would not be liable to an action.

The court refused the rule on this point.<sup>1</sup>

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SPENCER v. DAWSON.

AT NISI PRIUS, CORAM PARKE, B., JULY 28, 1836.

[Reported in 1 *Moody & Robinson*, 552.]

CASE for deceit in the warranty of a horse. Plea, not guilty.

PARKE, B., held that under the New Rules, Hilary term, 4 W. IV., the plea put in issue both the warranty and the unsoundness; in short, the whole declaration, except the bargain and sale, which were matter of inducement.

*Verdict for the plaintiff.*<sup>2</sup>

<sup>1</sup> *Card v. Case*, 5 C. B. 622, *accord.* — *Ed.*

<sup>2</sup> *Eastwood v. Bain*, 3 H. & N. 788, *accord.* Conf. *Mummery v. Paul*, 1 C. B. 816. — *Ed.*

On nonsuit Pltff. may begin again. Verdict settles Dft. on that case finally.

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Of course Not guilty does not deny Scienter when an unnecessary allegation.

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Scienter not necessary except in action on case & not guilty puts it in issue then.

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Not guilty does not put in issue matter of inducement.

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←←←  
Action for tort. Everything necessary to tortious act is a part of act traversed by not guilty. Warranty not tort of deceit unless warranty is untrue.



Care

Declaration for libel.

Plea: Not guilty.

Defense - privileged communication.

Hold that this is admissible under Not guilty, as it goes to the very root of the whole matter.

Seems to be an affirmative plea & that is general law in this country.

7 Allen 61; 1 Samf. 489; 6 Ohio 5128;

70 N.C. 810; 53 N.H. 594.

Lillie v. Price is known set-  
that law in England.

Malice is conclusively  
proved by uttering of words.  
hence this cannot be a  
plea to allegation of malice.

## LILLIE v. PRICE.

IN THE KING'S BENCH, NOVEMBER 15, 1836.

[Reported in 5 Adolphus &amp; Ellis, 645.]

DECLARATION for libel contained in a letter. Plea, not guilty. On the trial before Lord Denman, C. J., at the sittings in Middlesex after last Trinity term, the defence was that the alleged libel was a privileged communication. The defendant's counsel objected that this answer could not be given under the plea of not guilty. The Lord Chief Justice thought otherwise, and left the whole case to the jury, who found for the defendant.

*Sir W. W. Follett* in this term<sup>1</sup> moved for a rule to show cause why a new trial should not be had, on the ground of misdirection. It has never yet been decided that in an action for libel the defence of privileged communication may be set up, under a plea of the general issue. The point was brought before the Court of Common Pleas, but not decided, in *Smith v. Thomas*.<sup>2</sup> In the rules, Hil. 4 W. IV., Pleadings in Particular Actions, IV. 1,<sup>3</sup> it is said that the plea of not guilty, in an action for slander of the plaintiff in his office, profession, or trade,<sup>4</sup> "will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged." But it cannot be inferred from this that the same plea will let in the defence of privileged communication, which involves matter not properly determinable by a jury. The mere plea of not guilty does not give the plaintiff any notice of such a defence. In *Stanciliffe v. Hardwick*,<sup>5</sup> where a question of the same kind arose as to the admissibility of evidence, in an action of trover, to justify the conversion, it was held that, to let in such a defence, the plea ought to have been special. Cases bearing some analogy to the present have arisen in actions of assumpsit, as *Barnett v. Glossop*,<sup>6</sup> and where the defence was the want of a written contract to satisfy the statute of frauds, it has been held, since the New Rules, that that must be specially pleaded.<sup>7</sup> [LORD DENMAN, C. J. In the instance of an action of

<sup>1</sup> November 5. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, JJ.

<sup>2</sup> 2 New Ca. 372.

<sup>3</sup> 5 B. & Ad. ix.

<sup>4</sup> The slander in the present case was not charged as affecting the plaintiff in any particular capacity.

<sup>5</sup> 2 Cro., M. & R. 1; s. o. 5 Tyr. 551.

<sup>6</sup> 1 New Ca. 638.

<sup>7</sup> But see *Johnson v. Dodgson*, 2 M. & W. 653.

slander, mentioned in the rule of pleading just cited, it is said that the plea of not guilty will operate as before, in denial of having spoken the words maliciously.] *Cur. adv. vult.*

LORD DENMAN, C. J., now said: We have consulted the other judges on this point, and are of opinion that the defence of privileged communication, as it goes to the very root of the matter of complaint, need not be specially pleaded. *Rule refused.*<sup>1</sup>

### PERRING v. HARRIS.

AT NISI PRIUS, CORAM LORD ABINGER, C. B., DECEMBER 12, 1836.

[Reported in 2 Moody & Robinson, 5.]

CASE. The declaration stated that the plaintiff was an occupier of a house within the parish of Greenford ratable and entitled to be assessed for the relief of the poor of that parish; yet that defendant, being overseer of the poor, wrongfully and maliciously omitted to insert her name in the rate, whereby she was prevented from applying for and obtaining a license to sell beer, &c., on her premises.

Plea, that the plaintiff was not entitled to be assessed, &c.

Issue thereon.

The plaintiff having given evidence to show that she was the occupier of premises in the parish, which entitled her to be rated to the relief of the poor; that on those premises her father had been used to carry on the business of a victualler, and that she had made arrangements to carry on the same,

*Kelly* submitted that the plaintiff must be called. If such an action be maintainable at all, it can only be on the ground of some special damage being sustained. Here the plaintiff has indeed alleged special damage, but has given no evidence of it; for, supposing her name had been on the rate, it does not appear that the magistrates would in their discretion have given her a license.

*Platt*, contra, contended that on these pleadings the special damage was admitted. If, as the defendant contends, the special damage be the gist of the action, he ought to have denied that special damage by his plea, just as in the case of slander for words actionable only by reason of special damage.

*Kelly*. It is not necessary ever to deny in pleading what is alleged

<sup>1</sup> Hoare v. Silverlock, 9 C. B. 20; Lucan v. Smith, 1 H. & N. 481; ~~Hennsfield v. Deary~~, 11 A. & B. 98, accord. Conf. Smith v. Thomas, 2 B. N. C. 872. Ed.

Case

Declaration that Plff. was entitled to have her name inserted in rate list but that Dept. refused to insert whereby she was deprived of applying for & obtaining a license to sell beer on premises.

Plea: Plff. not entitled to be assessed.

Plff. proved that she was entitled to be so inserted assessed.

Dept. contended that then special damage must be proved.

Held that the plea admits the in special damage and puts in issue nothing except right to be rated.

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As a rule damage is not an essential allegation to declaration. In certain kinds

damage P'ty. is required to give notice in order to offer evidence of it. Few cases where damage itself is one of the constituent parts of declaration, i.e.; Slander, where words are not actionable per se; also in this case damage an essential part of right of action. Wrongful act complained of is omission of name by which she was damaged. Not guilty, denies this. Plea in the case should have been not guilty. Actual plea good - not included in general issue. Denial of her right not of his act. Case:-

~~Declaration~~ against Deft, Sheriff of Surrey, that although a writ in favor of P'ty against one Gompertz was put in his hands for execution & Gompertz had goods in his bailiwick yet Deft. did not use due diligence to levy nor had turned over the 122£ to W levied for the P'ty but had returned a false return, nulla bona.

Plea - not guilty.

Held that under this plea Deft. could not show that Gompertz had no goods in his bailiwick but could only show that he used diligence or had not returned nulla bona.

Finis.

simply by way of damage; it is for the plaintiff to give evidence of that, whatever the form of the plea may be.

LORD ABINGER, C. B., said: It appears to me that the defendant ought to have denied the special damage, if, as is admitted, that special damage goes to the foundation of the plaintiff's right of action; by merely traversing the title of the plaintiff, the defendant admitted some damage to have been sustained by her, supposing she has title.

*Verdict for the plaintiff.*

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LEWIS v. ALCOCK.

IN THE EXCHEQUER, HILARY TERM, 1838.

[Reported in 3 Meeson & Welsby, 188.]

CASE against the sheriff of Surrey for a false return to a *feri facias*. The declaration stated a judgment recovered by the plaintiff in the Court of King's Bench against one Henry Gompertz for £200, and a writ of *testatum fieri facias*, issued thereon, directed to the sheriff of the county of Surrey, indorsed with a direction to levy £122, besides sheriff's poundage, &c. It then alleged that the writ so indorsed, afterwards and before the execution thereof, to wit, on, &c., was delivered to the defendant, who then and from thence until and after the committing of the grievance thereafter mentioned, was sheriff of the said county of Surrey, to be executed in due form of law; and although there were then and afterwards, and before the return of the said writ, divers goods and chattels of the said Henry Gompertz within the bailiwick of the defendant as such sheriff as aforesaid, whereof the defendant could and might and ought to have levied the moneys so indorsed on the said writ and directed to be levied as aforesaid, whereof the defendant, so being such sheriff as aforesaid, always had notice; and although a reasonable time for the defendant, as such sheriff, to have made the levy, and before he had made the return to the said writ, and committed the grievances thereafter mentioned, had elapsed, yet the defendant, so being such sheriff as aforesaid, &c., not regarding his duty, &c., did not nor would, within such reasonable time, levy the said moneys so directed to be levied as aforesaid, or any part thereof, but therein wholly failed and made default; nor hath he paid the said sum of £122, or any part thereof, to the plaintiff; and afterwards, to wit, on &c., the defendant falsely and deceitfully returned upon the said writ that the said H. Gom-

pertz had not any goods or chattels in his, the defendant's, bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof, &c. Plea, not guilty.

At the trial before Littledale, J., at the last Surrey assizes, the only question between the parties was, whether a bill of sale given by Gompertz, the debtor against whom the execution issued, to one Longmore, upon notice of which the sheriff had forbore from levying under the *feri facias*, was *bona fide* or colorably given. It was however contended for the plaintiff, on the authority of *Wright v. Lainson*,<sup>1</sup> that the defendant could not raise this question under the plea of not guilty. The learned judge reserved the point; and a verdict having been found for the plaintiff,

*Channell*, in Michaelmas term, obtained a rule, pursuant to the leave reserved, to show cause why a verdict should not be entered for the plaintiff for £122, or why there should not be a new trial.

*Thesiger, Dowling*, and *C. Turner* now showed cause. This case is distinguishable from *Wright v. Lainson*. There the declaration alleged that the defendant had levied, and the breach consisted only in his not having the money in his hands, and in his making the return of *nulla bona*; and the question, whether the goods seized were those of the debtor or of his assignees, clearly was not involved in the issue of not guilty. But that case proceeds on the express ground that every thing involved in the breach of duty charged is included in the issue. Now, if the defendant here showed that the goods were not Gompertz's, he committed no breach of duty in not levying on them. [PARKER, B. *Wright v. Lainson* is exactly on all-fours with this case. The breach there was, that the sheriff had not the money ready to pay over, and made the return of *nulla bona*. Here the inducement which points to the duty of the sheriff is, that the writ was delivered to him, and that there were goods of the debtor within his bailiwick; then it becomes his duty to seize them. Then the breach is, that he did not use due diligence to make the levy, and that he returned *nulla bona*. If it were proved that he did not return *nulla bona*, the latter proposition would be disproved; if that he did use due diligence, the former would be disproved. These are the only two propositions in issue, according to *Wright v. Lainson*. ALDERSON, B. The falsehood of the return is the conclusion of law, if the facts stated in the inducement are true: not guilty puts that fact in issue which is wrongful, if the facts stated in the inducement be true.] Suppose there were no such statement as that "although there were divers goods and chattels of the said H. G., &c.,

<sup>1</sup> 2 M. & W. 789.

Not guilty puts in issue the  
wrongful act.



Can for malicious arrest.

Plea not guilty.

Ptff. offered to prove rule to discontinuance to show termination of former suit.

Judge reserved point & Dft. moved for a nonsuit on point reserved.

Held that not guilty admits <sup>verges</sup> the discontinuance & only puts in issue the malicious arrest without probable cause. Dft. should have traversed the material allegation of termination of former suit.

whereof the defendant ought to have levied," &c., but that after the statement of the writ the declaration had proceeded, "yet the defendant did not levy, &c., although there were diverse goods," &c., then the latter clause would have formed part of the neglect of duty complained of; and the mere transposition of the words can make no difference. [PARKE, B. It would then, in truth, be inducement put in the wrong place. ALDERSON, B. I do not see why you may not treat the allegation as to the writ in the same way, — "although a certain writ," &c.]

*Platt, Channell, and Petersdorff*, in support of the rule, were stopped by the court.

PARKE, B. There can be no doubt that this case falls within the authority of *Wright v. Lainson*. The defendant ought, however, to have leave to amend his plea.

ALDERSON, B. The object of the rule is, that the parties, when they come to trial, shall know, as precisely as is possible, what the issue is. I am disposed to give the rule as large a construction as possible.

The other judges concurring, the rule was made absolute for a new trial, on payment by the defendant of the costs of the former trial and of this application, the defendant having leave to amend.

*Rule accordingly.*<sup>1</sup>

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### WATKINS v. LEE.

IN THE EXCHEQUER, TRINITY TERM, 1839.

[Reported in 5 Meeson & Welsby, 270.]

CASE for a malicious arrest. Plea, not guilty.

The declaration averred that the defendant did not prosecute his suit, but voluntarily suffered the same to be discontinued for want of prosecution thereof, and thereupon it was considered by the court that the defendant should take nothing by his writ.

To prove this allegation, the plaintiff, at the trial, proved a rule to discontinue, and that the defendant had paid the costs of the discontinuance. *Jervis* objected that this did not prove the judgment of discontinuance, upon which Parke, B., allowed the plaintiff to amend, and saved the point whether a rule to discontinue on payment of costs

<sup>1</sup> *Wright v. Lainson*, 2 M. & W. 789, accord. See *Harden v. Standish*, 6 C. B. 504. — Ed.

was a sufficient termination of this suit to enable the plaintiff to sue for a malicious arrest.

*Jervis* now moved for a nonsuit on the point reserved. No action for a malicious arrest can be maintained until the prior suit is finally terminated. For this purpose a rule to discontinue is not enough, even though acted upon by payment of costs. In *Bristow v. Heywood*,<sup>1</sup> it was decided to be sufficient, but the case went off upon another point, and no opportunity was afforded of reviewing that decision. In *Brandt v. Peacock*,<sup>2</sup> the point arose immediately, but there was there a judgment of discontinuance, and if the rule had there been deemed to be sufficient, much discussion would have been saved. In *Fanshaw v. Heard*,<sup>3</sup> it was decided that the first action must be legally determined, and in *Drummond v. Pigou*,<sup>4</sup> Gaselee, J., said, that a rule for a discontinuance is not evidence to show that the action has been discontinued; there must be a judgment of discontinuance. If this would do, a rule for judgment as in case of a nonsuit would have the like effect. [LORD ABINGER, C. B. How does the question arise upon this record?] In *Drummond v. Pigou* that point was raised, but not decided. In truth, it is a doubtful question upon the construction of the late rules. The plea of not guilty operates as a denial of the wrongful act, but not of the facts stated in the inducement. R. G., H. 4, W. 4. The termination of the suit is not inducement, but material to the maintenance of the action. The want of it would be cured by verdict, because it would be presumed to have been proved at the trial.<sup>5</sup>

LORD ABINGER, C. B. As the action cannot be maintained until the former suit is terminated, the discontinuance is a material allegation, which the defendant should have denied; not having done so, he admits the discontinuance. The plea of not guilty puts in issue merely the malicious arrest without probable cause.

ALDERSON, B. The meaning of the rule is, that the wrongful act only is put in issue. *Rule refused.*<sup>6</sup>

<sup>1</sup> 4 Camp. 214; 1 Stark. N. P. 48.      <sup>2</sup> 1 B. & Cr. 649; 3 D. & R. 2.

<sup>3</sup> 1 M. & P. 191.

<sup>4</sup> 2 Bing. N. C. 114; 4 M. & Scott, 287

<sup>5</sup> 1 Wms. Saund. 228.

<sup>6</sup> *Drummond v. Pigou*, 2 B. N. C. 114; *Atkinson v. Raleigh*, 8 Q. B. 79; *Hedrick v. Heslop*, 12 Q. B. 267, *accord.* — ED.

Allegation in Declar.

1. Arrest at instance of Dept without  
reasonable or probable cause & mo-  
ticiously.
2. Prosecution terminated in the  
Pltf's failure.

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Not guilty puts in issue the  
arrest without reasonable or  
probable cause.

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The termination in favor of  
the Pltf. is necessary to  
show that Pltf. has a right  
to sue

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Case for negligent driving.

Plea; not guilty.

Evidence was offered to show that Drft. was not driving though it was his car, but that he had lent it to another.

Held inadmissible under the general issue. Not guilty admits everything but wrongful act itself & hence admits that Drft. was driving which is a mere matter of inducement, therefore the Drft's plea cannot be contradicted by his evidence under that plea.

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Case wrong.

1. Drft. wasn't there & if not there he could not do act.

Not guilty must deny not only that the act was done but also that Drft. did not do it.

Words in brackets are immaterial

## TAVERNOUR v. LITTLE.

IN THE COMMON PLEAS, JUNE 11, 1839.

[Reported in 3 Jurist, 702.]

CASE. The declaration stated that the plaintiff, on, &c., was possessed of a horse of the value of £30, on which a servant of the plaintiff was riding along a certain common highway, and that the defendant was possessed of a certain cart, and of a certain horse drawing the same, which said cart was then and there under the care, government, and direction of the defendant, who was then and there driving the same along the said common highway, yet the defendant so carelessly and negligently drove the said cart, that, through the misconduct and negligence of the defendant, the cart ran and struck against the horse of the plaintiff and injured it, &c. Plea, not guilty.

good  
declaration  
leaving out  
words to -  
show  
negligence.

At the trial before Bosanquet, J., injury to the plaintiff's horse having been proved, evidence was offered on the part of the defendant to show that he was not the person driving the cart at the time of the accident, but that he had lent his cart to a person of the name of Jenkins; but the defendant's name was on the cart, and it was not disputed that he was the owner. The learned judge was of opinion that the defendant could not, under the plea of not guilty, give evidence that the defendant was not the person driving; and the plaintiff obtained a verdict.

*Robinson* having obtained a rule *nisi* for a nonsuit, or for a new trial, on the authority of *Bennion v. Davison*,<sup>1</sup>

*Wilde*, Serjt., and *Andrews*, Serjt., showed cause. *Bennion v. Davison* was an action of assumpsit, to which form of action a particular rule applies. Here the declaration complains of a particular act as unlawful; and when the act might have been done innocently, the plea of not guilty only puts in issue whether it was done in a wrongful manner. The rule in case is express, that "the plea of not guilty shall operate as a denial of the breach of duty or wrongful act complained of, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea." All the instances given in the rules carry out this principle. So in *Stancliffe v. Hardwick*,<sup>2</sup> the defendant in trover was not allowed, under the plea of not guilty, to show the legality of the conversion; so in an action for an escape, it is submitted that the having the party in custody could not be disputed under not guilty; so the possession of the carriage cannot be disputed

<sup>1</sup> 1 A. C. 6 B. N. C. 678.<sup>2</sup> 3 M. & W. 179.<sup>3</sup> 2 C., M. & R. 19

in this case. If a constructive liability is to be made out, which was, in fact, the case in this very action, the use of the rule is to prevent the necessity of calling witnesses to prove the ownership. See *Francum v. Lord Falmouth*. In *Wheatley v. Patrick*,<sup>1</sup> it was held that a defendant was liable to such an action as the present, though he was not the person driving at the time of the injury. So in *Woolf v. Beard*<sup>2</sup> and *Bush v. Steinman*.<sup>3</sup> *Dawson v. Moore*<sup>4</sup> cannot be considered as a decisive authority the other way. So in *Thomas v. Morgan*, the *scienter*, which was held to be put in issue, was that which gave an injurious character to the defendant's conduct. In this case two issues are raised: first, defendant's driving; secondly, the injury complained of: the traverse of one is an admission of the other.

*Robinson*, contra. It is not disputed that on the occasion in question the defendant had lent his cart. The question put to the jury was, whether the mischief was occasioned by the negligence of the plaintiff or of the defendant. [BOSANQUET, J. I certainly told the jury that, if the defendant lent his cart with his name upon it to another, he was under the circumstances liable. *Stables v. Eley*.<sup>5</sup>] In *Stables v. Eley*, the only question was, whether the defendant continued liable as a partner; the declaration was there framed on a different principle from the present. There is no reason or principle of law why the name being on the cart should make any difference. The cases on that subject are *Samuel v. Wright*<sup>6</sup> and *Dean v. Branthwaite*,<sup>7</sup> but they turned on the circumstance of a loan on hire. The real point of the case turns on the decision in *Bennion v. Davison*. Here the wrongful act is the negligent driving; it is neither the negligence alone nor the driving alone, but compounded of both, just as in *Cotton v. Brown*, where the plea of not guilty was held to let in the denial of want of probable cause. Suppose there had been no inducement, and, in fact, the inducement is unnecessary, and might have been omitted altogether, could not the defendant have shown that that stranger had done the act? Or suppose the plaintiff had gone on further to allege in the inducement that the defendant was driving negligently. The plea of not guilty denies every thing except matter which cannot be treated as part of the wrongful act. *Wheatley v. Patrick* and *Bush v. Steinman* are in the defendant's favor as there the question turned on the liability of the defendants only. The very instance given in the rules with respect to nuisance supports the defendant's view of the case. That rule lays down that not guilty shall operate as a denial that the defendant carried on the alleged trade

<sup>1</sup> 2 M. & W. 650.<sup>2</sup> 7 C. & P. 25.<sup>3</sup> 5 Esp. 268.<sup>4</sup> 8 C. & P. 373.<sup>5</sup> 1 C. & P. 714.<sup>7</sup> 5 Esp. 85.<sup>6</sup> 1 B. & P. 404.

Thence not admitted under  
not guilty.





in such a way as to be a nuisance. The matters of inducement relate to the plaintiff's right of action. *Cur. adv. vult.*

The judgment of the court was on a subsequent day delivered by TINDAL, C. J. This was a question on the New Rules. The declaration contained averments of the possession of the horse by the plaintiff, and of the cart by the defendant; and after the usual recital comes the allegation of careless driving by the defendant. The question is, whether under the plea of not guilty the defendant might prove that he had lent the cart to a third person; and we are of opinion that, as well by a proper construction of the New Rules as by the analogy of decided cases, the evidence was inadmissible. The rule, Hil. 4 Will. IV., is, that "in actions on the case the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." Here, in the first part of the declaration, are contained the allegations of the plaintiff's possession and the defendant's possession. These statements form together the inducement in the declaration, and by the express words of the rule the plea shall not operate as a denial of either. The rule then goes on: "And no other defence than such denial shall be admissible under that plea." The denial, then, of the fact of driving is no less excluded by the negative words of the latter part of the rule, than by the affirmative words of the former part. It has been argued that these words in the rule must be confined to those words in the declaration which relate to the plaintiff; but the example of the carrier given in the rule itself is against that construction. *Bennion v. Davison* may be put out of the case. That was an action of assumpsit; and it is sufficient to say that then the ownership was immaterial; but *Wright v. Lainson*<sup>1</sup> and *Lewis v. Alcock* are strongly in favor of our present construction. In the first of those cases it was held that in an action on the case against a sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, where the declaration stated that the sheriff had levied, the plea of not guilty puts in issue only the fact of the sheriff's not having the money in his hands and making the alleged return; and in the latter case it was decided that the sheriff could not, under that plea, show that there were no goods of the debtor's which he could have levied. It is further contended that the inducement of the defendant's driving is wholly unnecessary, and that it would have been sufficient for the plaintiff to have alleged that the defendant wrongfully, &c., drove the cart against the plaintiff's horse. To this it is a sufficient answer to say that the plaintiff has pursued the usual

<sup>1</sup> 2 M. & W. 739.

course of pleading, and that the rule must be taken to refer to matters which are usually stated by way of inducement. A similar argument was used in the case of *Lewis v. Alcock*, and was in that case met by the remarks of Parke, B., and Alderson, B. *Rule discharged.*<sup>1</sup>

### NORTON v. SCHOLEFIELD.

IN THE EXCHEQUER, APRIL 19, 1842.

[Reported in 9 *Meeson & Welsby*, 665.]

CASE for an injury to the plaintiff's reversionary interest. The declaration alleged that, before and at the time of committing the grievance, &c., the premises were in the possession of one A., as tenant thereof to the plaintiff, the reversion thereof expectant on the determination of the said tenancy belonging to the plaintiff. It then stated the right of the plaintiff and his tenants to a certain well and pump; that the defendant was possessed of premises adjoining the premises of the plaintiff, and that he, intending to injure the plaintiff, &c., erected a cesspool so near the well and pump that the water was contaminated and rendered useless by the oozing out of the soil and filth from the cesspool. The defendant had applied to Lord Denman, C. J., at chambers, for leave to plead the following pleas: first, not guilty; secondly, a traverse of the right of the plaintiff and his tenants to the use of the well and pump; thirdly, a traverse of the plaintiff's reversionary interest in the premises; and, lastly, a special plea, denying that the water in the well had been contaminated by the erection of the cesspool. Lord Denman, C. J., refused to allow the last plea, on the ground that the subject-matter of that defence might be given in evidence under the plea of not guilty.

*Waddington* now applied to the court for leave to plead the above four pleas, and submitted that the plea of not guilty put in issue only the fact of the erection of the cesspool.

PARKE, B. I think the Lord Chief Justice was right in disallowing the last plea; not guilty puts in issue both the act complained of and

<sup>1</sup> *Emery v. Clark*, 2 M. & Rob. 260; *Hart v. Crowley*, 12 A. & E. 378; *Dunford v. Trattles*, 12 M. & W. 529; *Woolf v. Beard* 8 C. & P. 373; *Wheatley v. Patrick*, 2 M. & W. 650; accord; *Dawson v. Moore*, 7 C. & P. 25, *contra*. Conf. *Mitchell v. Craswell*, 13 C. B. 237; *Bennion v. Davison*, 8 M. & W. 179; *Grew v. Hill*, 3 Ex. 801 — Ed.

*Titchell v. Craswells & Grew v. Hill not really contra. Held possession per se in case on denial & that deft did the act deemed by not guilty.*

Case for injury to Pltf's neighborly interest.

Declaration that Deft. erected a cess-pool on his property so near a well & pump on Pltf's property as to damage it. Pltf desired to plead following

Pleas: 1. Not guilty

2. Denial of right to use well & pump.

3. Denial of neighborly interest

4. Denial of Contamination of water by erection of cess-pool.

Held that the last plea was inadmissible as being included in general issue. Gen'l issue includes not only the wrongful act but its consequences.

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Slander & Libel are same as this. See also Peering & Harris.

2nd & 3rd. plead traverse  
in duccment showing Plt's  
right.

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its consequences. In actions for negligence, a defendant is never allowed to plead that the injury was caused by the plaintiff's own negligence.

ALDERSON, B. By the general issue the defendant says, "I am not guilty of erecting a building which is a nuisance."

ROLFE, B., concurred.

*Motion refused.*<sup>1</sup>

<sup>1</sup> Wilby v. Elston, 8 C. B. 421; Eastwood v. Baim, 8 H. & N. 738; Williams v. Mostyn, 4 M. & W. 145; Wylle v. Birch, 4 Q. B. 566; Bales v. Wingfield, 4 Q. B. 580, *accord.* — ED.



65 taller  
18 omitted } from here on  
93

## SECTION III.

*Special Traverses.*

Order.

134.

130 (1st).

135 (1st).

136 (2d).

## HUISH v. PHILIPS.

IN THE COMMON PLEAS, EASTER TERM, 1600.

[Reported in Croke's Elizabeth, 754.]

*Audita querela.* And shows that he was obliged in a statute-merchant of £600 to the defendant, to the use of one John Bush; and that a defeasance was made thereupon, that if he paid such sums at such days to John Bush, that the statute should be void; and shows that at every of the days and places he was *paratus* to pay the said sums, *et obtulit* them, and the said John Bush was not there to receive them. The defendant pleaded that at such a day John Bush was at the place where, &c., and demanded the sum, and neither the plaintiff nor any for him were there for to pay it, *absque hoc* that the plaintiff *obtulit* the said sum at the said day, &c. And thereupon the plaintiff demurred.<sup>1</sup>

It was held that the traverse was not good; for there being an express affirmative before, *quod paratus fuit, et obtulit, &c.*, and *non obtulit* being an express negative, there shall not be any traverse; for when a matter is expressly pleaded in the affirmative, which is expressly pleaded by the other party in the negative, there a traverse is needless, because there is a sufficient issue joined, as 36 Hen. VI. pl. 15, is. Wherefore it was adjudged for the plaintiff.<sup>2</sup>

absque hoc  
clause  
bad

omit.

## THORN v. SHERING.

IN THE KING'S BENCH, TRINITY TERM, 1640.

[Reported in Croke's Charles, 586.]

*TRESPASS de clauso fracto.* The defendant justifies his entry by the command of J. S. The plaintiff replies, and shows that J. S. was

<sup>1</sup> Only so much of the case is given as relates to the special traverse. — Ed.

<sup>2</sup> Y. B. 36 Hen. VI. fol. 15, pl. 9; Finley v. Woodruff, 8 Ark. 323; Day v. Essex Bank, 13 Vt. 97, accord. — Ed.

Special traverse - ambiguous - often means - traverse other than general issue - It is used in sense of abque hoc traverse. Old kind. In later cases little used. Proper form was; 1st state affirmation matter which argumentatively denies & then in abque hoc traverse directly. Object to plainly present a single issue to the jury.

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Pltf. alleged that he was bound to Deft. in a statute merchant for payment of a certain sum on a certain day & that he was prepared and ~~was bound to pay~~ them, but Deft. was not there to receive. Plea: Pltf. was not there to pay it abque hoc that Deft. <sup>indeb.</sup> obligat said sums on said day. Drus. traverse held bad. 1st clause denies a material allegation & hence abque hoc makes it duplex too bad.

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There were two traverses & hence the whole was bad for duplicity.

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Audita querela is an action to set aside or prevent an execution issuing in case of some matter arising after judgment.



The case at trial seems to be new  
substantive matter, and if so  
the subsequent traverse of com-  
mand by T. S. was a second  
defense of the replica. Would be  
bad for duplicity.

If command was immaterial  
then the replication might have ~~been~~  
specifically denied the alle-  
gation in the plea of fact.

A good traverse must be accepted  
& issue joined.

seised in fee and let to him at will, and traverseth the command of J. S. The defendant maintains that J. S. commanded him to enter, and that he entered by his command, and traverseth the lease at will: and hereupon it being demurred, it was adjudged for the plaintiff that the command was traversable, and that the defendant's rejoinder to make a traverse upon a traverse, as this case is, was not good. Wherefore judgment was given for the plaintiff. In Easter term, 38 Eliz, in Parker's Case, adjudged that the command is traversable<sup>1</sup>

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BENNET v. FILKINS. *mist.*

IN THE KING'S BENCH, MICHAELMAS TERM, 1666.

[Reported in 1 Saunders, 20.]

DEBT. The plaintiff declares upon a bond for £200 entered into by the defendant to the plaintiff by the name of John Bennet, esquire, bailiff of the liberty of the dean and chapter of the collegiate church of St. Peter, Westminster, dated the 6th of February, in the seventeenth year of the now king. The defendant prays oyer of the condition, which is, that if one Kingwell appeared before the king at Westminster, on Saturday next after the octave of the Purification of the Blessed Mary, to answer to Sir William Bolton, knight, and James Bradshawe, of a plea of trespass, and also to a bill, &c., for £90, then the bond shall be void, &c. To which the defendant pleads the statute of 23 H. VI. c. 10, of sheriff's bonds; and further says, that the plaintiff was bailiff of the liberty aforesaid, and before the bond was taken, viz., in Hilary term in the sixteenth and seventeenth years of the now king, Bolton and Bradshawe sued out a bill of Middlesex against Kingwell, returnable on Friday next after the octave of the Purification; and the sheriff thereupon made a warrant to the plaintiff, then bailiff of the liberty according to the bill of Middlesex, by force whereof the plaintiff arrested Kingwell, and had and detained him in his custody for the cause aforesaid; and Kingwell being in his custody, the defendant, together with one Inch and Kingwell, entered into the said bond and condition for ease and favor to be shown to Kingwell of his said imprisonment, and for having his deliverance from thence, which bond the plaintiff accepted by color of his office, and against the form of the statute; and so the defendant says that the bond

<sup>1</sup> Anon., 8 Salk. 858; Chicheley v. Ely, Cro. Car. 105; Harrington v. Litchfield 4 B. N. C. 77; Gerrish v. Train, 8 Pick. 124; Prosser v. Woodward, 21 Wend. 205, accord. — Ed.

taken in form aforesaid, by force of the statute, was void and of no effect; and prays judgment if he ought to be charged by this bond. The plaintiff replies, that Bolton and Bradshawe in the same Hilary term sued out a bill of Middlesex against Kingwell, returnable on Saturday next after the octave of the Purification, according to the condition of the bond, upon which the sheriff made his warrant accordingly to the plaintiff (being bailiff), by virtue whereof the plaintiff took Kingwell; and the plaintiff further says that Kingwell, at the time of making the bond, was in prison under the custody of the plaintiff, then bailiff of the liberty by virtue of that warrant, and not by virtue of the warrant specified in the plea of the defendant. And this, &c. Wherefore, &c. The defendant rejoins as before, that Kingwell, at the time of making the said bond, was in prison under the custody of the plaintiff, by virtue of the said warrant specified in the plea of the defendant; without this, that Kingwell was in prison under the custody of the plaintiff, by virtue of the warrant in the replication of the plaintiff above mentioned, as the plaintiff has alleged. And this, &c. Wherefore, &c. To which rejoinder the plaintiff demurs in law specially, because the defendant has taken a traverse upon a traverse.

And it was argued by *Wilde*, Serjt., on the part of the plaintiff, that the defender's rejoinder was bad, because the defendant has taken a traverse after a traverse: for the plaintiff has replied that Kingwell was in custody by virtue of the warrant, returnable on Saturday next after the octave of the Purification, which was the right one according to the condition of the bond, and not by virtue of the warrant returnable on Friday next after the octave of the Purification, as the defendant has pleaded. And this was a traverse upon which the defendant ought to take issue, and not to traverse over as he hath done here. And he put several cases where there shall be no traverse after a traverse taken before by the other side, as 27 H. VIII., fo. 3 a, and Digby and Fitzherbert's Case, Hob. 103; and here, he said, the plaintiff in his replication has traversed the warrant returnable on Friday, and therefore the defendant in his rejoinder cannot traverse the warrant returnable on the Saturday; and so he concluded that the rejoinder is bad.

*Saunders*, for the defendant, argued that the rejoinder was good. And, first, he denied that the plaintiff hath made any traverse in his replication, for the plaintiff only says that the said Kingwell was in prison by virtue of the warrant returnable on Saturday, and not by virtue of the warrant returnable on Friday, which was no traverse, but a flat negative, and the plaintiff has relied upon the precedent affirmative matter, and has not traversed at all. For the proper words of

...  
nich w

then :

a traverse are "without this," which are not in the plaintiff's replication, and therefore he has not taken any traverse. But the court did not pay much regard to this. Then he argued that the traverse in the defendant's rejoinder was good, notwithstanding the plaintiff has taken a traverse in his replication. And he agreed to the rule that a traverse ought not to be taken after a traverse; but he took the difference to be, where the first traverse is good, and taken to a material point, and goes to the substance, then there shall be no other traverse taken after; but where the first traverse is idle, and not well taken, nor pertinent to the matter, but is of that which was sufficiently confessed and avoided before, there the other party may take another traverse after such immaterial traverse taken before; and for this he relied upon the above-cited case of Digby and Fitzherbert. Then here the defendant has pleaded that Kingwell was in prison by virtue of the warrant returnable on Friday, and therefore the condition of the bond, not being pursuant to the return of the warrant, was void; whereupon the plaintiff in his replication has shown that he was, according to the condition, in prison by virtue of the warrant returnable on Saturday, which was according to the condition of the bond; then the plaintiff has fully confessed and avoided the defendant's plea; for though Kingwell was in prison by virtue of the warrant alleged by the defendant, yet if he was also in prison by force of the warrant alleged by the plaintiff, the bond was good, and not void: and therefore it was not material for the plaintiff to traverse the warrant alleged by the defendant, which the plaintiff has sufficiently confessed and avoided before. And he further said, that if issue should be joined upon the traverse offered by the plaintiff, it would be a jeofail at common law. For suppose it should be found that Kingwell was in prison by virtue of the warrant returnable on Friday, yet at common law the court could not proceed to judgment for the defendant, because it does not appear but that he might also have been in prison by virtue of the warrant returnable on Saturday, because it is so pleaded and not denied by the other party, and therefore the bond good. And although, perhaps, it would be aided at this day by the statutes of jeofails, yet the defendant is not constrained to take such issue any more than he was at the common law. And he argued further, that the issue shall be taken upon the most material point, and for this he cited Helyar's Case, 6 Rep. 24 *b*. And the most material point here was the warrant returnable on the Saturday, which was the rightful warrant; for upon issue joined upon this, a verdict found one way or the other determines the matter. For if it be found that the said Kingwell was in prison by force thereof, the bond is good; and if it be found that Kingwell was not in prison by force thereof, the

bond is void. And also he put the cases of 41 Edw. III.; Dy. 171; Cro. Car. 384. Trespass for breaking the plaintiff's close; the defendant says that it is his freehold; if the plaintiff entitles himself to a term for years, he shall not traverse the freehold of the defendant, because he has sufficiently avoided it; and the plea and replication may well stand together. And so he concluded that the rejoinder was good.

And for these reasons Twysden and Wyndham, justices, were of the same opinion, Moreton, justice, being absent. But Kelynge, chief justice, was of opinion that the rejoinder was bad, because he took it to be but one warrant, but that the parties differed in the return of it. And then the plaintiff, alleging it to be returnable at another day than the defendant has pleaded, he did well to traverse the return which the defendant has alleged before, upon which traverse the defendant ought to have taken issue, and not to traverse over. And afterwards in the same term, the matter was argued again by Pemberton for the plaintiff, and Jones for the defendant, to the same intent as before. And Twysden, Wyndham, and Moreton, justices, delivered their opinions *seriatim* for the defendant, that the rejoinder was good, Kelynge, chief justice, being absent; but, at the instance of the plaintiff's counsel, the court gave him liberty to discontinue his action upon payment of costs, although it was after they had delivered their judgment.

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*Talk.* ~~scribble~~ FORTESCUE v. HOLT.

IN THE KING'S BENCH, TRINITY TERM, 1672.

[Reported in 1 Ventris, 218.]

A *scire facias* was brought upon a judgment of £1,000, as administrator of J. S.

The defendant pleaded that before the administration committed to the plaintiff, viz., such a day, &c., administration was granted to J. N., who is still alive at D., and demandeth judgment of the writ.

The plaintiff replies, J. N. died, &c., and *de hoc ponit se super patriam*. And to that the defendant demurs.

For that he ought to have traversed *absque hoc*, that he was alive; for though the matter contradicts, yet an apt issue is not formed without an affirmative and a negative; and so said the court.<sup>1</sup>

<sup>1</sup> Y. B. 10 H. VI., fol. 7, pl. 21; Ewer v. Molle, Yelv. 140; Courtney v. Phelps, 1 Sid. 801; Ayer v. Joyner, Ow. 141; Kenchin v. Knight, 1 Wils. 253; Muntz v. Foster, 6 M. & G. 745, per Coltman, J.; Spear v. Bicknell, 5 Mass. 125; Eames v. Savage, 14 Mass. 425, *accord*. — ED.







*take.* ~~take.~~

## ANONYMOUS.

IN THE KING'S BENCH, EASTER TERM, 1697.

[Reported in 8 Salkeld, 353.]

WHERE a matter is confessed and avoided, it need not be traversed. In replevin the defendant avowed, for that W. R. was seised and made a lease to him, the defendant, for one year, and so justified the taking, &c., damage-feasant. The plaintiff replied, that true it is that W. R. was seised, &c., but before he made a lease to the defendant he made another to the plaintiff, which is still in being, and not determined. This is sufficient without a traverse, because the title of the defendant is confessed and avoided; but if the plaintiff had traversed the lease of the defendant, it would have been good upon a general demurrer, being only in the nature of a double plea; but upon a special demurrer it had been naught.<sup>1</sup>

*omit.* —

## HORN v. LEWIN.

IN THE KING'S BENCH, HILARY TERM, 1700.

[Reported in 2 Salkeld, 583.]

IN replevin the defendant made conusance for £100 *de redditu onerat. in aretro pro uno anno*. The plaintiff as to £50 pleads *de injuria sua propria absque hoc quod suit in aretro*, and as to the other £50, that he was ready on the land till sunset, and none came to receive it, and that he is still ready to pay it, and brings the money into court. Defendant demurs specially to the first plea,<sup>2</sup> *quia attingit ad generalem exitum*. And as to the other £50, he takes it out of court, *et pro dampnis dicit quod non obtulit, &c.*, and upon this the plaintiff demurred.

The case being several times spoken to, it was held, that *de injuria sua propria absque hoc, &c.*, was an impertinent, roundabout way of pleading the general issue, and that it amounted to no more than

<sup>1</sup> Rice v. Harrison, Yelv. 221; Rex v. Kilderby, 1 Saund. 812 d; Helyar's Case, 6 Rep. 24; Mannings v. Townsend, Cro. El. 161; Waltham v. Sparks, 1 Ray. 41; Bedel v. Lull, Cro. Jac. 221; Covert's Case, Cro. El. 754; Johnson v. Norton, 2 Roll. R. 442; Denny v. Mazey, 2 Vent. 212; Johnson v. Norway, Winch, 88; Pearson v. Rogers, 9 A. & E. 308; Oystead v. She1, 18 Mass. 520; Breck v. Blanchard, 20 N. H. 323, accord; Newman v. Moore, Hob. 80, contra. — Ed.

<sup>2</sup> Only so much of the case is given as relates to this plea. — Ed.

the general issue, *riens in arrears*, and consequently was ill upon a special demurrer. Also, this traverse put the defendant to an unnecessary replication; therefore, as to the £50, it was clear for the defendant.<sup>1</sup>

*omit*

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COURTNEY v. SATCHWELL.

IN THE KING'S BENCH, EASTER TERM, 1726.

[Reported in 1 *Strange*, 694.]

IN trespass, assault, and false imprisonment, the defendant justifies under a process out of the sheriff's court in London, *quæ est eadem*, &c., and traverses being guilty *aliter vel alio modo*; to this the plaintiff demurs, and shows for cause that the traverse is idle, and unnecessary. And upon argument the court were of opinion that this was ill on a special demurrer, *quæ est eadem* being a sufficient traverse. Lutw. 1457. And so it was held in the case of *Carvil v. Manby*, where on a general demurrer it was allowed to be well enough; but the court said if it had been a special demurrer, it would have been otherwise. *Judicium pro querente*.<sup>2</sup>

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PALMER v. EKINS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1728.

[Reported in 2 *Lord Raymond*, 1550.]

THE plaintiff, Henry Palmer, as assignee of John Palmer, brought an action of covenant against Elizabeth Ekins for non-payment of rent, wherein he declared that John Palmer was seised in fee of the messuage, &c., and being so seised, the 27th of March, 1716, by indenture made between him on the one part, and the defendant on the other part (one part of which indenture, sealed by the defendant, the plaintiff produces in court), demised to the defendant a messuage in the parish of St. Michael Crooked Lane, London, for twelve years from Lady-day, 1716, rendering £18 per annum during the said term to the said John Palmer, his heirs and assigns, payable at four quarterly payments;

<sup>1</sup> *Gough v. Bryan*, 2 M. & W. 770, *accord*. — Ed.

<sup>2</sup> *Hargrave v. Ward*, 3 Lutw. 468; *Hawe v. Planner*, 1 Saund. 18, *accord*. See *Tyler v. Wall*, Cro. Car. 228. — Ed.

Forfeiture Act.

Plea - Justification under a process from another Ct. which is the same Act. & transes being guilty aliter vel alio modo. Special demurrer. Held bad because not ~~the~~ part under.

Two transes in same plea is hardly duplicity but makes an absurdity. Bad because not proper form for it.

Action of covenant for non payment of rent in a lease.

Plea that P'ty's grantor was seized but conveyed premises away by joint lease was made.

Plea held bad. The indenture itself being produced set off Def. from pleading nil habuit in tenementis & this being a special plea to that effect is bad.

can raise rather a question of  
Substantive law.

A tenant cannot deny the  
title of his landlord.

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Protestation not now used  
for admission of pleadings  
today are not capable of being  
used in other Suits.

Earlier they were so used  
thence protestations

that the defendant by the said indenture covenanted to pay the said rent at the days and times in the said indenture mentioned to the said John Palmer, his heirs and assigns; that by virtue of this demise the defendant entered and continued possessed of this messuage, &c., till after the 26th of March, 1725. That John Palmer, being seised of the reversion in fee, by lease and release, dated the 22d and 23d of November, 1723, conveyed it to Henry Palmer, the plaintiff in fee; then the plaintiff assigns his breach, in the defendant's not paying three-quarters rent due, and ending Lady-day, 1725. The defendant, *protestando* that John Palmer did not make such lease, for plea says, that John Palmer was seised in fee of this messuage 19th of November, 1706, and being so seised by lease and release dated the 19th and 20th of November, 1706, conveyed this messuage, &c., to one John Bragg, in fee; and traverses, *absque hoc*, that John Palmer *ad aliquod tempus post prædictum* 20th of November, 1706, *seisitus fuit de messuagio prædicto in dominico suo ut de feodo, modo et forma* as the plaintiff declares. To this plea the plaintiff demurred generally, and the defendant joined in demurrer.

This case was argued at several times by Mr. Serjt. *Girdler*, Mr. Serjt. *Baines*, and Mr. *Fazakerley*, for the plaintiff, and by Mr. Serjt. *Belfield*, Mr. *Usher*, and Mr. *Filmer*, for the defendant. And the 26th of November, 1728, I, at my brothers' desire, delivered the opinion of the court, that the plea was ill, and the plaintiff ought to have judgment. And we resolved,

That the defendant could not plead, John Palmer *nil habuit in tenementis* at the time of the lease made, to an action brought by John Palmer, supposing he had not conveyed to the plaintiff: because it appearing upon the face of the declaration that the lease was made to her by indenture made between John Palmer and her, which she had executed; she is estopped by the indenture. And for that purpose the case of *Kemp v. Goodhall*,<sup>1</sup> in debt for rent by indenture, if the defendant pleads *nil habuit in tenementis*, the plaintiff may demur and need not reply the estoppel, because it appears upon the declaration; but if the defendant plead *nil habuit in tenementis*, and the plaintiff replies *habuit*, &c., the jury may find the truth, notwithstanding the indenture.<sup>2</sup>

That this plea of the defendant amounted to a special *nil habuit in tenementis*, for by the inducement to the traverse she shows that John Palmer, in 1706, long before he made the lease to the defendant, which was in 1716, conveyed in fee to Bragg. If so, John Palmer had nothing in the messuage, &c., when he made the lease. For an estate in fee-simple is always intended to continue, unless it be shown to be con-

<sup>1</sup> Pasch. 4 Annæ, B. R. 6, 1 Ld. Raym. 1154.

<sup>2</sup> A portion of the case not relating to pleading is omitted. — Ed.

veyed away or determined. Therefore this plea amounts to a special *nil habuit in tenementis*, which is no more to be admitted to be pleaded by a lessee by indenture, than a general *nil habuit in tenementis*. But the defendant, by a proper inducement, might have made this traverse good; as if he had pleaded in his inducement to the traverse that J. S. was seised of the messuage in fee, and being so seised conveyed it to John Palmer for his life, and that John Palmer being so seised, made the lease to the defendant, and afterwards conveyed to the plaintiff, and that then John Palmer died; whereby he would have showed that an interest passed by the lease to the defendant as long as John Palmer lived, and that by his death the lease was determined; then such traverse as in the present case would have been good. For the estoppel that appeared upon the face of the declaration, would have been avoided by showing an interest past; and such plea would not have amounted to a *nil habuit in tenementis*, because an estate for life would have appeared to have been in John Palmer. But no interest appears to be in John Palmer in this case, when the lease was made to the defendant; nor can the court intend there was any interest in him, since the plea sets out a conveyance before the lease to Bragg in fee simple, which estate must be intended to continue.<sup>1</sup>

*put.*

THE MAYOR AND COMMONALTY OF ORFORD v. RICHARDSON AND ANOTHER.

IN THE KING'S BENCH, NOVEMBER 18, 1791.

[Reported in 4 Term Reports, 487.]

IN THE EXCHEQUER CHAMBER, JUNE 19, 1793.

[Reported in 2 Henry Blackstone, 182.]

TRESPASS for fishing in the plaintiff's free fishery, and also in their several fishery in Orford Haven, Suffolk. Plea, that Orford Haven from time immemorial hath been and is an arm of the sea, in which every subject of this realm hath had and still ought to have the liberty of free fishing. Replication, that the corporation of Orford are a corporation by prescription, and also by charter granted by Queen Elizabeth, and that the corporation have immemorially had and enjoyed, and still ought to have and enjoy, the exclusive liberty of dredging and fishing for oysters in the said place, &c., at all seasonable times of the

<sup>1</sup> See Brudnell v. Roberts, 2 Wils. 148. — Ed.

not true  
as far as  
the title is concerned

→ Peculiar point.

This is a case of a special franchise  
being not only useful but necessary.  
Very doubtful if it could be pleaded any  
other way. It is in effect a transfer of the  
seignior in fee. Could a direct franchise  
be made. A plea against fee might be held  
not to transfer all title sufficient to make  
lease but merely fee & under it Deft. show  
end of former good title. This questionable.  
Franchise for fishing in Pltfs' several  
fishing.

Plea that Orford Haven (which Pltfs'  
claimed to be their several fishing) is  
an arm of sea in which all subjects  
have right to fish.

Replication That Pltfs' by prescription  
have exclusive right in said Orford  
Haven & traverse that it is an  
arm of sea etc.

Rejoinder. That said place is an  
arm of sea etc & traverse Pltfs'  
prescriptive right.

Demurrer.

Held by King's Bench that rejoinder  
is bad since ~~traverse~~ tendered  
in replication should have been  
a traverse



is bad as it lengthens pleadings.  
but reversed in Exch. Ch. for the  
traverse tendered in Replication  
is immaterial for under that  
if Pltfs proved right in some  
third party they could recover  
on the pleadings in trespass  
which would be wrong. Strice  
rejoinder held good.

Was plea good? Ex. "That Oxford  
Tavern was an arm of sea" was  
sufficient the following clause  
was a conclusion of law for the  
Ct. & it would have been bet-  
ter left out. The clause how-  
ever is mere surplusage & does  
not make plea bad in form.

Replication? If the traverse that  
it was arm of sea was good then  
the Rep - would be bad for de-  
plicity. The setting up of pre-  
scription is not an indirect  
denial of the alleged bar traverse.  
But here the traverse was im-  
material & hence the new  
matter was good by itself

year, traversing that in the said arm of the sea every subject has a right of free fishing, &c. Rejoinder, that the place in which, &c., hath been immemorially an arm of the sea; in which every subject has a ~~right of free fishing~~, traversing the prescriptive right claimed by the plaintiffs in the replication. Demurrer, because the plaintiffs in their replication traversed a material and issuable point of the defendants' plea, and by that traverse tendered to the defendants a material issue, but the defendants in their rejoinder did not take issue upon that traverse, or join in issue with the plaintiffs thereupon, but passed by and took no notice thereof, and traversed another part of the plaintiffs' replication, and thereby attempted to put in issue another matter, and a matter alleged by the plaintiffs by way of inducement only to the traverse so made and taken by the plaintiffs; and thus attempted to introduce great uncertainty, confusion, and unnecessary length of pleading, &c.

*T. Walton* was to have argued in support of the demurrer; but the court desired

*Baldwin*, contra, to begin; who endeavored to support the rejoinder by saying that the traverse tendered in the replication was a matter of law, and that in such a case the defendant was at liberty to traverse the inducement to the plaintiffs' traverse. It is not disputed but that, where a material traverse is tendered which will put the whole question in issue, the adverse party must take issue on it; but here the plaintiffs wished to traverse a mere matter of law, because in an arm of the sea every subject has a right *prima facie* to fish. *Carter v. Murcote*;<sup>1</sup> *Warren v. Matthews*.<sup>2</sup> The defendants being subjects, have a *prima facie* right to fish, without going into evidence to establish that right, but the party disputing that title must show a prescriptive right in himself. And therefore the defendants offered a traverse of the special right in the corporation, which was the material issue to be tried, namely, whether or not they had such a separate right as would take it out of the general rule of law. That there may be a traverse upon a traverse, when the first is not material, is clear from many authorities. In *Mall. Qu. Imp. 229*, it is said, that if the traverse tendered be not material in substance, the other party may traverse the inducement to such traverse, and need not take issue on the former traverse. Again, in *Hob. 104*, "A man brings an action of waste for felling trees, and lays that the lessee fell and sold them; the defendant confesses that he felled them, but saith that he bestowed them in repairing the house, *absque hoc* that he sold them. The plaintiff may reply that he let them rot, or any like case of waste, *absque hoc* that he employed them to reparations, and this is traverse upon traverse."

<sup>1</sup> 4 Burr. 2162.

<sup>2</sup> Salk. 587; 1 Mod. 105.

So in *Crane v. The Bishop of Norwich*<sup>1</sup> in *quare impedit* the plaintiff declared on a seisin in A., who conveyed to B., who conveyed to the plaintiff, and that afterwards the church became void; the defendant pleaded that before the conveyance to the plaintiff the church became void, and B. presented him, traversing that the church was void at any time after the conveyance to the plaintiff. The plaintiff replied that A. presented the defendant, traversing that B. presented him. That was a traverse of the inducement to the defendant's traverse, and held good.

LORD KENYON, C. J. It seems clear from the cases cited that, where a traverse is tendered, which is not calculated to try the right in question, the other party need not take issue upon it, since it would be a nugatory issue. But it is admitted that there cannot be a traverse upon a traverse, when the first will decide the whole question. And this does not depend on any arbitrary or capricious rule, but is founded on good sense and reason; otherwise pleading would answer no other purpose than that of lengthening the record. With regard to the question of law in this case, as to the right claimed by the plaintiffs, there can be no doubt but that there may be a prescriptive right in a subject to a several fishery in an arm of the sea. Here, then, after the defendants had pleaded that the place in question was an arm of the sea, in which every subject has a right of fishing, the plaintiffs replied a prescriptive right in themselves "without this, that in the said arm of the sea every subject has a right of free fishing," &c. That was saying, in other terms, "The right of fishing in this place does not stand on the general public right, but on special grounds derogatory from the general law." That traverse necessarily involved in it the real question in dispute between the parties, and consequently the defendants should have taken issue upon it.

ASHHURST, J. It is clearly established that wherever the point in question is traversed by one party, the other must take issue upon it, for they are not to go on *in infinitum*. The use of pleading is to bring the matter in litigation to one point. And there cannot be any doubt here but that the merits of this case might have been fairly tried on the first traverse. But it has been objected that this was a traverse of the law: that argument would have been well founded if there could be no prescription against the general right; but, as it is clear that there may be a prescription to take away the general right of the public in an arm of the sea, the traverse tendered by the plaintiffs would put in issue the real question between these parties; for it is founded on an antecedent fact introduced into the replication, which, if true, would defeat the general right upon which the defendants relied.

<sup>1</sup> Lutw. 1632.

\* the transmission of that good new matter by Dept. was a good rejoinder.

Replication not demurrable in this because transmission is bad.

Rejoinder how operates as a direct transmission. It would be bad as a special transmission but all except the good direct transmission is held to be surplusage.

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If abuse here is bad it is just treated as surplusage.



BULLER, J. The defendants' counsel has endeavored to support the second traverse on two grounds; first, because the traverse tendered by the plaintiffs is a matter of law; and secondly, because it is immaterial. The first is answered by saying that this is to be supported by evidence, and is not mere matter of law. And as to the other ground, the rule of pleading has been truly stated, that, if the first traverse tendered be immaterial, the adverse party may add another traverse. Then with regard to the materiality of the plaintiff's traverse, the fair question might have been as well tried on the first as on the second traverse. For one party is to prove that this is an arm of the sea, in which *prima facie* every subject has a right to fish; the other is to establish a prescriptive right, which destroys the general right. And if the point in litigation come directly to be tried on either of these issues, it must be tried on that traverse which is first tendered. It is like the case of a traverse where the life or death of another person is to be put in issue; if the first traverse tendered be that the party is dead, issue must be taken on that, or *vice versa*; because either of these traverses will bring the same question to trial. The case cited from Hobart is distinguishable from the present. There the defendant tendered an immaterial traverse; the cutting down the trees was the wrong, and it was immaterial to the merits of that case whether the tenant had or had not sold them.

GROSE, J., declared himself of the same opinion.

*Judgment for the plaintiffs.*

The assignment of errors was: "There is error also in this, that judgments were given for the said mayor and commonalty against the said John and William upon the several demurrers in the record and proceedings aforesaid, whereas judgments ought to have been given on those demurrers for the said John and William against the said mayor and commonalty, inasmuch as the places in which, &c., being admitted upon the said record and proceedings to be arms of the sea, or a public navigable river, in which the tide and water of the sea flowed and reflowed, the several traverses in the record and proceedings aforesaid, tendered by the said mayor and commonalty, are traverses of mere inferences of law, and therefore are immaterial traverses; and inasmuch as the traverses in the record and proceedings tendered by the said John and William are traverses of the several prescriptions of the said mayor and commonalty, whereon alone the title of the said mayor and commonalty to the fisheries in question, and consequently to maintain this action, depends, and therefore are the only material traverses to be taken and tendered."

This case was twice argued, the first time in Easter term, by Wood

for the plaintiffs in error, and Chambre for the defendants; the second, in the present term, by Bower for the plaintiffs, and Le Blanc, Serjt., for the defendants. After which,

Lord Chief Justice EYRE said shortly, in the name of the court, that they had sent this case to a second argument, rather from an unwillingness to adopt, without great deliberation, a decision contrary to that of the court from whence the record came, than from any difficulty they saw in the question. For from the moment it appeared that upon the pleadings the plaintiffs might have recovered a verdict in an action of trespass, without having either possession or right, it seemed very difficult to support the judgment. That the first traverse was of the right of all the king's subjects to fish in the arm of the sea, stated by the defendants; now this was clearly a bad and immaterial traverse, for it was not only a traverse of an inference of law, but it was so taken, that if at the trial it had been proved that it was the separate right of others, and not of the plaintiffs, the issue must have been found for the plaintiffs, not only without their being obliged to prove either possession or right, but where in fact they had neither possession nor right. That an immaterial traverse might be passed over, and the matter of the inducement traversed; which had been properly done in this case by the defendants.

*Judgment reversed.*<sup>1</sup>

<sup>1</sup> King v. Bolton, 1 Stra. 117; Thrale v. Bishop, 1 H. Bl. 376; Breck v. Bishop, 20 N. H. 323; Wheelwright v. Beers, 2 Hall, 391, *accord.* — Ed.

2



Action of trespass for driving cattle.

Defl. pleaded that one Marys had bought a certain right of common & had commanded Defl. to drive cattle out. Repli. De injuria. Held that replication was bad for de injuria can only be pleaded when Defl. sets up an Excuse there it was a right which he set up.

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It of course allowed several pleas. But De injuria comparable to Quil issue, in the way of a Quil issue in Replication.

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1. Matter of record cannot be included - it is tried before Judge by production of record though matter of fact hence not allowed to be put to jury.
2. Interest in lands not allowed must be traversed specially in case of importance.
3. Question of authority 1st part right & law

## SECTION IV.

*Replication de Injuria.*

## EDWARD CROGATE'S CASE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1608.

[Reported in 8 Reports, 66.]

*Order.*  
 143.  
 155.  
 166.  
 177.

EDWARD CROGATE brought an action of trespass against Robert Marys, for driving his cattle in Town-Barningham, in Norfolk, &c. The defendant pleaded that a house and two acres in Bassingham, in the said county, were parcel of the manor of Thurgarton, in the same county, and demised, and demisable, &c., by copy, &c., in fee-simple, &c., according to the custom of the manor, of which manor William, late Bishop of Norwich, was seised in fee in the right of his bishopric, and prescribed to have common of pasture for him and his customary tenants of the said house, and two acres of land *in magna pecia pasturæ vocat' Bassingham common, pro omnibus averiis, etc., omni tempore anni*, and the said bishop, at such a court, &c., granted the said house and two acres, by copy, to one William Marys, to him and his heirs, &c. And that the plaintiff put his said cattle in the said great piece of pasture, wherefore the defendant, as servant to the said William, and by his commandment, *molliter* drove the said cattle out of the said place, where the said William had common, *in præd' villam de Town-Barningham*, adjoining to the said common of Bassingham, &c. The plaintiff replied *de injuria sua propria absque tali causa*. Upon which the defendant demurred in law. And it was objected on the plaintiff's part that the said replication was good, because the defendant doth not claim any interest, but justifieth by force of a commandment; to which *de injuria sua propria absque tali causa* may be fitly applied: and this plea, *de injuria sua propria*, shall refer only to the commandment, and to no other part of the plea; and they cited the books in 10 H. VI. 3 a, b, 9 a; 16 H. VII. 3 a, b, &c.; 3 H. VI. 35 a; 19 H. VI. 7 a, b, &c. But it was adjudged that the replication was insufficient. And in this case divers points were resolved. 1. That *absque tali causa* doth refer to the whole plea, and not only to the commandment, for all maketh but one cause, and any of them, without the other, is no plea by itself. And therefore, in false imprisonment, if the defendant justifies by a *capias* to the sheriff, and a warrant to hir-

there, *de injuria sua propria* generally is no good replication, for then the matter of record will be parcel of the cause (for all makes but one cause), and matter of record ought not to be put in issue to the common people, but in such case he may reply *de injuria sua propria*, and traverse the warrant, which is matter in fact. But upon such a justification, by force of any proceeding in the Admiral Court, hundred, or county, &c., or any other which is not a court of record, there *de injuria sua propria* generally is good, for all is matter of fact, and all makes but one cause. And by these differences you will agree your books in 2 H. VII. 3 b; 5 H. VII. 6 a, b; 16 H. VII. 3 a; 21 H. VII. 22 a (33); 19 H. VI. 7 a, b; 41 E. III. 29 b; 17 E. III. 44; 18 E. III. 10 b; 2 E. IV. 6 b; 12 E. IV. 10 b; 14 H. VI. 16; 21 H. VI. 5 a, b; 13 R. II. Issue 163.

2. It was resolved that when the defendant in his own right, or as a servant to another, claims any interest in the land, or any common, or rent going out of the land, or any way or passage upon the land, &c., there *de injuria sua propria* generally is no plea. But if the defendant justifies as servant, there *de injuria sua propria* in some of the said cases, with a traverse of the commandment, that being made material, is good; and so you will agree all your books, *scil.*, 14 H. IV. 32; 33 H. VI. 5; 44 E. III. 18; 2 H. V. 1; 10 H. VI. 3, 9; 39 H. VI. 32; 9 E. IV. 22; 16 E. IV. 4; 21 E. IV. 6; 28 E. III. 98; 28 H. VI. 9; 21 E. III. 41; 22 Ass. 42; 44 E. III. 13; 45 E. III. 7; 24 E. III. 72; 22 Ass. 85; 33 H. VI. 29; 42 E. III. 2. For the general plea, *de injuria sua propria, &c.*, is properly when the defendant's plea doth consist merely upon matter of excuse, and of no matter of interest whatsoever; *et dicitur de injuria sua propria, &c.*, because the injury properly in this sense is to the person, or to the reputation, as battery or imprisonment to the person, or scandal to the reputation; there, if the defendant excuse himself upon his own assault, or upon hue-and-cry levied, there properly *de injuria sua propria* generally is a good plea, for there the defendant's plea consists only upon matter of excuse.

3. It was resolved, that when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuria sua propria*. The same law of an authority given by the law; as to view waste, &c. *Vide* 12 E. VI. 10; 9 Ed. IV. 31; 20 Ed. IV. 4; 42 Ed. III. 2; 16 H. VII. 3.

Lastly, it was resolved that, in the case at bar, the issue would be full of multiplicity of matter, where an issue ought to be full and single for parcel of the manor, demisable by copy, grant by copy, prescription of common, &c., and commandment would be all parcel of the issue. And so, by the rule of the whole court, judgment was given against the plaintiff.

authority given by law that not so.  
He must set forth facts which  
authorize him in law to do it.

#### 4. Duplicity or Multiplicity.

This not an objection according  
to later cases just as not an  
objection to Gen'l Issue which  
put in issue several points.

Only used in following cases  
of actions:

|           |          |          |          |
|-----------|----------|----------|----------|
| Assumpsit | } All in |          |          |
| Covenant  |          | } recent |          |
| Trespass  |          |          | } cases. |
| Case      |          |          |          |
| Replevin  |          |          |          |
| Debt.     |          |          |          |

Issues, as to whether title to chat  
tel was put in issue by it.  
Never decided.

A misfeas of de injuria is only  
ground of special demurrers.  
3 M & W. 229. at all event after  
the statute of 4 Anne. Under  
St Eli. it was held substance  
2 L. 1. 1. 1. P. 1110 is out of it.

12

7



## TAYLOR v. MARKHAM

IN THE KING'S BENCH, TRINITY TERM, 1609.

[Reported in Croke's James, 224.]

IN an action of trespass and battery, the defendant pleaded that he, at the time of, &c., was seised of the rectory of D. in fee; and that at the same time and place where the trespass and battery were supposed, &c., corn was severed from the nine parts; and for that the plaintiff would have carried away his corn, the defendant there stood in defence thereof, and kept the plaintiff from carrying it away; so as the harm which the plaintiff received was of his own wrong, &c. The plaintiff replies, that the trespass and battery were done *sans tiel cause alledge*, &c. Whereupon the defendant demurred in law.

It was adjudged for the plaintiff; for it is not requisite in this case for the plaintiff to answer the defendant's title, because he does not by this action claim any thing in the land or corn, but only damages for the battery, which is collateral to the title; and therefore the general replication is good; but when the plaintiff makes a title in his declaration to any thing, and the defendant pleads another thing against it, the plaintiff must reply specially, and not say *sans tiel cause*, as it is in 14 Hen. IV., and 16 Edw. IV.<sup>1</sup>

## FURSDON v. WEEKS.

IN THE COMMON PLEAS, TRINITY TERM, 1682.

[Reported in Levinz, 65.]

TRESPASS for battery and false imprisonment 1 Aug. 31 Car. II. at D. in Com. Devon. The defendant justifies by virtue of a writ *ex Banc Regis Com' Middlesex Vicecom' Devon*, and a warrant and arrest thereupon at D., and traverses all other places and times. The plaintiff replies *de injuria sua propria absque tali causa*. The defendant demurred, and had judgment; for to thrust matter of record, and matter of fact, and varieties of matters, as the warrant, the arrest, &c., at once in issue is nought upon general<sup>2</sup> demurrer;<sup>3</sup> according to

<sup>1</sup> Hall v. Gerrard, Latch, 128, 221, 278; Earl of Bedford's Case, Cro. El. 14; Vivian v. Jenkins, 3 A. & E. 741; Sampson v. Henry, 11 Pick. 379, *accord.* — ED.

<sup>2</sup> In Hooker v. Nye, 1 C. M. & R. 258, and Coffin v. Bassett, 2 Pick. 357, the improper use of the general replication *de injuria* was fatal on a general demurrer; but in Parker v. Riley, 3 M. & W. 230, Fursdon v. Weeks and Hooker v. Nye were expressly overruled. — ED.

<sup>3</sup> Y. B. 3 H. VI. f. 35, pl. 29 (*semble*); Y. B. 21 H. VI. f. 5, pl. 14; Y. B. 5 H.

Crogate's Case. Also the replication here wants a conclusion, *scil.*, *et hoc petit quod inquiratur per patriam*; for the replication in this case ought to make an issue of itself; but the words which ought to make the issue, and *hoc petit*, &c., are omitted.

*omit.*

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CHANCE v. WEEDEN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1700.

[Reported in 2 Salkeld, 628.]

TRESPASS for two hundred bushels of salt. The defendant sets forth the act for laying a duty on salt, 10 W. III., that it was put on board to be exported, not being weighed, &c.; that he was an officer, &c., and seized it; the plaintiff replied *de injuria sua propria absque tali causa*; the defendant demurred. *Et per* HOLT, C. J. Where the defendant justifies by virtue of an authority by the common law, as a constable by arrest for breaking of the peace, under process of the admiralty, &c., *de injuria sua propria* is a good replication; so it is, and by the same reason, when one justifies by an authority of an act of Parliament; for, being a general law, the statute can be no part of the issue. *Vide* 16 H. VII. 2; 5 H. VII. 6; Co. Ent. 643. A justification upon the statute *de malefactoribus in parais*, and a like replication. As for the case in Crogate's Case of waste, and enter *pur viem*, Holt, C. J., said it stood on a particular reason. Also the court held the plea ill, because it was not showed what sort of salt this was, — bay-salt, pit-salt, white-salt, &c., for the statute does not extend to all.

*Judgment pro quer.*<sup>1</sup>

VII. f. 6, pl. 12 (*semble*); Y. B. 2 Ed. IV. f. 6, pl. 15; Y. B. 12 Ed. IV. f. 10, pl. 28; Webb v. Beale, Hard. 6 (*semble*); Lytle v. Lee, 5 Johns. 112; Griswold v. Sedgwick, 1 Wend. 180, *accord.* — Ed.

<sup>1</sup> Allen v. Scott, 18 Ill. 80; Coburn v. Hopkins, 4 Wend. 578; Stickle v. Richmond, 1 Hill, 77, *contra*. See also Lytle v. Lee, 5 Johns. 114; Plumb v. M'Crea, 12 Johns. 491; Allen v. Crofoot, 7 Cow. 46; Griswold v. Sedgwick, 1 Wend. 180. Conf. Lane v. Robinson, 2 Mod. 102; Moor v. Savage, 2 Leon. 81. — Ed.





Trespass for impounding cattle.

Plea that the Cattle were damaged  
frequent on land belonging to  
~~Drift~~ bailiffs & burgesses of a  
certain town & Drift. were  
their servants. Repl. De injuria.

Held that the Replication is  
bad.

1<sup>st</sup> puts in issue several  
points +

2 It is not pleaded to a  
matter of Ejectment but to a  
right set up by Drift.

At present day possession  
would have been sufficient  
to maintain trespass & hence  
to defend an action of this  
kind & hence title not nec-  
essary in this case.

Probably possession may be  
put in issue by injuria.

Fact that possession was  
sufficient to maintain the  
case 1 East. 212 1<sup>st</sup> case.

*omit.*

THOMAS COCKERILL v. MATTHEW ARMSTRONG AND SIX  
OTHERS.

IN THE COMMON PLEAS, JUNE 20, 1738.

[Reported in *Willes*, 99.]

THE opinion of the court was thus delivered by  
WILLES, Ld. C. J. Trespass for taking, leading away, and impounding a gelding of the plaintiff's, and for keeping him in pound for the space of four days, &c. Damage, £30.

The defendants all pleaded a special plea, that the place where the gelding was taken at the time when, &c., was a close called Weapness, containing 1000 acres of pasture ground; of which said 1000 acres the bailiffs and burgesses of the borough of Scarborough were at the time, when, &c., seised in their demesne as of fee, and because the said gelding in the declaration mentioned at the time, when, &c., was in the said 1000 acres feeding upon and eating the grass there growing, and doing damage there, the said Matthew, &c., as servants of the bailiffs and burgesses of the said borough, and by their command, took the said gelding so feeding and doing damage there, and impounded the said gelding in the common and open pound at Scarborough aforesaid, and detained him there for the time mentioned in the declaration, as it was lawful for them to do; which is the same trespass, &c.

The plaintiff replies that the defendants took away and impounded the said gelding of their own wrong, without any such cause, &c.

The defendants demur; and for cause of demurrer show that the plaintiff in his replication hath traversed the said several matters contained in the plea, whereas he should have traversed one single matter, whereon a proper issue might have been joined; and that the said replication is uncertain, &c. The plaintiff joins in demurrer.

The single question is,<sup>1</sup> whether *de injuria sua propria absque tali causa* be a good replication, and we are all of opinion that it is not a good replication, for two reasons, both expressly laid down in Crogate's Case.

The first of them is the reason assigned as the cause of the demurrer, because it puts several things in issue, whereas the issue ought to be plain and single. For upon this issue the defendants must prove that the bailiffs were seised in fee (or, at least, that they were possessed);

<sup>1</sup> This case was twice argued, the first time in Easter, 1738, by Eyre, King's Serjt., for the defendants, and Bootle, Serjt., for the plaintiff; and again on the 10th of June, 1738, by Wynne, Serjt., for the former, and Burnett, Serjt., for the latter.

that the defendants acted by their command; that the gelding at the time when he was taken was in a close called Weapness, and that he was depasturing the grass and doing damage there.

The other rule, which is laid down by Lord Coke, is, that when the defendant in his own right, or as servant to another, claiming any interest in the land, or any way or passage therein, or rent issuing thereout, justifies the trespass, *de injuria sua propria absque tali causa* is not a good replication: and Crogate's Case is exactly parallel to this, only the present is a little stronger. There the action was only for chasing the plaintiff's cattle, which does not so much as imply any claim of right in the defendant; but here it is for taking away and impounding, which seems to imply a claim of right. And the plea is almost the same as this; for the defendant justifies as servant to one who claims a right in the place where, only it is not said there that the cattle were damage-feasant. So that in that respect likewise the present case is stronger than that. And yet, though the case in Coke is not so strong as the present in these two respects, *de injuria sua propria absque tali causa* was holden on a demurrer by the whole court after a solemn argument not to be a good replication. →

I do not at all rely on the case in Cro. Jac. 599, because *absque tali causa* is there omitted. But the case of Taylor v. Markham, though cited for the plaintiff in this case, makes, I think, rather against him. The case itself is plainly distinguishable from this; for the action is an action of assault and battery, where the title of the land can never possibly come to be material. But it is expressly there laid down that where the plaintiff in his declaration makes a title to any thing, and the defendant pleads another thing against it or in destruction of the cause of action of the plaintiff, there the plaintiff must reply specially, and *de injuria sua propria absque tali causa* is not a good replication; which is exactly the present case. And there is a case cited in Yelv., out 14 Hen. IV. 32, trespass for taking the plaintiff's servant; the defendant pleaded that the father of the person taken held of him by knight's service and died seised, the person taken being under age, and that he seized him as his ward; the plaintiff replied *de injuria sua propria absque tali causa*, and held to be no good replication; which case seems to be exactly parallel to the present. → I do not rely at all on the case of Cooper v. Monke and Others,<sup>1</sup> which was determined in this court as to this point in Hilary term, 1737; because that was an action for breaking and entering a house, which, to be sure, is plainly distinguishable from the present case. The case of Whitnell v. Cook<sup>2</sup> seems to be a case in point.

<sup>1</sup> Willes, 52.

<sup>2</sup> Cro. Eliz. 812.

This argument is not very good.  
Because it is drawn from Phip's  
declaration - that he impleads that  
def't. claims a right -- whereas  
the important question is, does  
def't. set up a right in his plea?

Why wasn't this held bad as involving title  
to the person of the servant, i.e. title to  
personality

Replevin from goods & chattels.

Cognizance that Deft. took them as  
Tidiff of owner of house, Pltff hav-  
ing rented house & rent being in  
arrear.

Plea in bar - de injuria.

Held bad because transacting a  
right & not excuse takes as  
transacting the command but  
not on the of putting many points  
~~down~~ in issue.

Replevin for taking cattle; the defendant, as bailiff to one Payne, seised of the third part of the place where, justified taking them damage-feasant; the plaintiff pleaded that a stranger was seised of the other two parts, and that he put the cattle in by his license, *de injuria sua propria*, &c., by the defendant; and that held on a demurrer not to be good, but judgment for the plaintiff.

It is said, indeed, in the case of the Archbishop of Canterbury v. Kemp,<sup>1</sup> that where the defendant himself claims an interest in lands, this is not a good replication, but where he justifies by command of another claiming interest, there it is: but this seems to be a distinction *without a difference*, as the title to the land must equally come in question, and is alike necessary to be proved in both cases; and it is directly contrary to Crogate's Case.

Whether or no in the present case it was necessary for the defendant to set forth a title, or whether he might have relied only on a possession (as this is not a *quare clausum fregit*, but an action for taking a personal thing without claiming any right to the place), we need not determine, though I think it was not necessary; because he having insisted on a seisin in fee, we think it is more than an inducement, and that it is necessary to prove it, or at least a possession which is *prima facie* a proof of a seisin in fee, and will be exactly the same thing in respect to the present point. And there is a plain difference between the present case and the case of an action for an assault and battery; because there, if the party be possessed, even though the plaintiff should have a title to the house or place, it will signify nothing; for his bare possession will justify him even turning the right owner out of the house: whereas here, if the plaintiff has a right to the place where, &c., for right of common, &c., it may quite destroy the defendant's plea. And the present case is the stronger, as the defendants have specially assigned this as a cause of demurrer.

We are therefore all of opinion that judgment must be for the defendants.

JONES v. KITCHIN.

IN THE COMMON PLEAS, JULY 5, 1797.

[Reported in 1 Bosanquet & Puller, 76.]

REPLEVIN for goods and chattels.

Cognizance, stating that the place in which, &c., was a house held by the plaintiff, under a demise from one John Osborne, at a yearly

<sup>1</sup> Cro. Eliz. 589.

rent of £42, payable on the quarterly feast-days; that £31 of the said rent was due, in arrear, and unpaid to the said John Osborne, and that the defendant, as bailiff of the said John Osborne, acknowledges, &c.

Plea in bar, *de injuria sua propria absque tali causa*.

Demurrer thereto, assigning for causes that the said plaintiff hath in and by his said plea tendered and offered to put several and distinct matters in issue, that is to say, the holding and enjoying of the said dwelling-house with the appurtenances in the said declaration and cognizance above mentioned by the said plaintiff; and hath also in and by his said plea denied that the said rent in the said cognizance mentioned was due, in arrear, and unpaid, as in that cognizance is above alleged and contained; and for that the said plaintiff hath also in and by his said plea tendered and offered to put in issue as well the times and manner of the payment of the said rent as also the amount and quantity of the same; and for that the said plaintiff should and ought in and by his said plea to have tendered and offered to put in issue one single fact only, to be tried by a jury of the country, and to have relied on the same; and for that in the manner the same plea is above pleaded, no certain or single issue can be joined in the same; and for that the said plea is double, multifarious, and not issuable, and is also in various other respects defective, argumentative, insufficient, and informal.

Joinder in demurrer.

The court, inclining against the plea in bar, called upon *Shepherd*, Serjt., to begin in support of it.

*Shepherd*. Where two facts are necessary to make up one defence, neither of which is matter of record, the plea *de injuria sua propria absque tali causa* is good; and so is the rule in *Crogate's Case*, 1st resolution. In *Chauncey v. Winde*, this distinction from 2 Leon. 102, was taken in argument, that where the matter of record is but inducement to the action, a special answer is not requisite; and Holt, C. J., thought the replication *de injuria* to a justification of trespass, under a warrant from the commissioners, by virtue of an act of Parliament, good. In *Robinson v. Rayley*, Lord Mansfield says: "It is true you must take issue on a single point, but it is not necessary that the single point should consist only of a single fact." So here tenancy in the plaintiff and rent in arrear are both necessary to entitle the defendant to restrain. Though at common law the defendant must have set forth his title, which would have precluded the plea *de injuria*, yet by the 11 G. II. c. 19, § 22, matter of title is excluded from the avowry, and nothing is to be set out but matters of fact, which in this case are tenancy and rent in arrear. If, therefore, this be not a good plea, the plaintiff must either admit the defendant's title to the land or







the rent in arrear. The intention of the statute was only to shorten the pleadings, and the defendant need not have stated by whom the demise was made, but the defendant's having gone beyond the statute makes no difference in the law. In a precedent book of Lawrence, J., there is such a plea as the present, and a note of his in the margin, stating that he demurred to it; but it was overruled. The plaintiff might have traversed every fact in the avowry by leave of the court, which leave is now become almost matter of right: the court, therefore, will not oblige him to do that in a circuitous manner, which may be done more shortly by the present plea.

*Marshall, Serjt., contra.* If this mode of pleading be good, the 11 G. II., instead of conferring a favor on landlords, would produce an inconvenience: it would be better to avow, as at common law, and have an explicit answer to one fact. This plea would put in issue, first, the holding, which, if there be no privity of contract, may involve the distrainer's title; secondly, the terms of the holding, viz., the amount and days of payment of rent; thirdly, that rent was in arrear; fourthly, that the distress was taken for that rent; and in the case of a cognizance, like the present, command. The fourth resolution in Crogate's Case is decidedly against the present plea in bar. I admit that if the several matters put in issue make together but one defence, they may all be put in issue together, and then *de injuria sua propria absque tali causa* is proper. But when the plaintiff makes title by his declaration to any thing, and the defendant pleads something in destruction thereof, or of the plaintiff's cause of action, then the plaintiff must reply specially, and not say *absque tali causa*, for *absque tali causa* goes to the whole plea. *Taylor v. Markham*, *Horn v. Lewin*,<sup>1</sup> *Witnel v. Cook*,<sup>2</sup> *Banks v. Parker*,<sup>3</sup> *White v. Stubbs*.<sup>4</sup> In *Cockerill v. Armstrong*, the declaration was trespass for taking a gelding; defendant justified as servant of J. S., who was seised in fee; replication, *de injuria sua propria absque tali causa*, and judgment for the defendant. The case is shortly reported in Com. 582, but I will read to the court the judgment of Lord Ch. J. Willes, as taken from his Lordship's note. It only remains to observe on the cases cited for the plaintiff. That which was called a single point in *Robinson v. Rayley* embraced several distinct facts, any one of which being negatived would have entitled the plaintiff to judgment; therefore the doctrine laid down there is directly contrary to the doctrine in Crogate's Case, which, before that, was considered as the great landmark. In *Chauncey v. Winde*, the court held the replication good, because the statute being a general one needed not to have been pleaded, and therefore could

<sup>1</sup> Fost. 288.<sup>2</sup> Cro. Eliz. 812.<sup>3</sup> Hob. 76.<sup>4</sup> 2 Saund. 294.

make no part of the issue; and in that case, as it is reported in 12 Mod. 580, Mr. Eyres, in arguing for the defendant, admitted that where one claims common by prescription, rent by grant, goods by sale, &c., and so justifies as having an interest therein, there the plaintiff must answer directly to the title, and not *de injuria sua propria*.

The court understanding that such a plea in bar as the present had been used of late, took time to consider.

The opinion of the court was this day delivered by

EYRE, C. J. As a wish has been expressed by the defendant's counsel that this case should be disposed of within the term, we will not keep it on foot any longer, for the sake of giving a more formal judgment than is already prepared. It is only necessary to read Crogate's Case, to be perfectly satisfied that on the authorities and on the reason of the thing this plea in bar is bad. The second resolution in that case is, "That when the defendant in his own right, or as servant to any other, claimeth an interest in the land, or to any common, or rent going out of the land, or to any way or passage upon the land, &c., there *de injuria sua propria* generally is no plea. That if the defendant justifieth as servant, there *de injuria sua propria* in some of the said cases, with traverse of the commandment, the same being made material, is good, &c. For the general plea, *de injuria sua propria* (which should be replication), is properly when the defendant's plea doth consist merely upon excuse, and upon no matter of interest whatsoever. And it is said *de injuria sua propria*, because the injury properly in this sense is to the person or to the fame; as battery or imprisonment to the person, or scandal to the fame. There, if the defendant excuse himself upon his own assault, or upon hue-and-cry, there properly *de injuria sua propria* generally is a good plea, for there the defendant's plea doth consist only upon matter of excuse." The third resolution is, "That when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuria sua propria*." Thus in this case the rule is distinctly laid down, that the replication *de injuria sua propria* is only to be received where the defence set up is matter of excuse, and not where it asserts any right or interest. Nor is that all; for if the defence turns on the plea of commandment, *de injuria sua propria* is not good, but the commandment must be answered. In the case of Cockerill v. Armstrong, which was trespass for taking a gelding, and the defendant pleaded that the place where, &c., was one hundred acres, &c., that J. S. was seised in fee, and that he, as his servant and by his express orders, took the gelding damage-feasant, it was held that the plaintiff could not reply *de injuria sua propria absque tali causa*

*Crogate's*

unt

L



This 1797 to personal injuries.  
Later to numerous other  
cases.

Declaration for damages for unwar-  
rantly suing out a Commission  
of bankruptcy against Plff.

Plea that Plff. was a trader & sold  
Deft 100 £ & became a bankrupt.

Repli. De injuria.

Held good. Here Deft. sets up  
no right but an excuse. The  
then acts of trading owing a  
creditor & becoming bankrupt  
only make one defense.

for that would put in issue three or four things; but he must traverse one thing in particular. The case is right in point of authority; and I agree with the rule laid down, that where the excuse arises in part out of the seisin in fee of another, there *de injuria sua propria* is not to be received. But the reason is not because it puts two or three things in issue, for that may happen in every case where the defence arises out of several facts, all operating to one point of excuse: the reason is, because this plea is only allowed where an excuse is offered for personal injuries, and not even then, if it relates to any interest in land (and here an interest in land would make part of the issue), or to any commandment. It is right that this case should be brought within the general rules of pleading, otherwise the 11 G. II., which was intended to operate for the ease and benefit of landlords, would be turned against them; for before the making of that statute, the issue in replevin must have been confined to some one material point. If we were now to break in upon the rule so satisfactorily laid down in Crogate's Case, we should confound all the rules of pleading. If we admit this plea in the present case, I do not see why we must not let it in, in *quare impedit*, and every other case. Let us stand by the rules of pleading, which if we infringe here we may destroy altogether. We are all of opinion that this plea in bar is bad.

*Judgment for the defendant.<sup>1</sup>*

*Important  
right.*

*Must!*

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O'BRIEN v. SAXON.

IN THE KING'S BENCH, EASTER TERM, 1824.

[Reported in 2 Barnewall & Cresswell, 908.]

DECLARATION for maliciously, and without any reasonable or probable cause, suing out a commission of bankruptcy against the plaintiff. Plea, that before the suing out of the commission, to wit, on, &c., at, &c., the plaintiff being a dealer and chapman, and seeking his trade, of living by buying and selling, and being indebted to the defendant in the sum of £100 and upwards, became and was a bankrupt, within the meaning of the several statutes then and still in force concerning bankrupts, or some or one of them, wherefore the defendant sued out the

<sup>1</sup> Archbishop v. Kemp, Cro. El. 539; Whitnel v. Cook, Cro. El. 812; King v. Hopper, Cro. Jac. 598; White v. Stubbs, 1 Lev. 307; s. c. 2 Saund. 234; Anon., 1 Roll. 47; Ruishbrook v. Pusanie, 4 Leon. 16; Cooper v. Monke, Willes, 52; Hooker v. Nye, 1 C., M. & R. 258; Langford v. Waghorn, 7 Price, 670; Solly v. Neish, 2 C., M. & R. 355; Gr. Falls Co. v. Wooster, 15 N. H. 412 (*semble*); Hyatt v. Wood, 4 Johns. 150, *accord.* — Ed.

commission of bankrupt in the declaration mentioned. Replication, that the defendant, of his own wrong, and without the causes by him in his plea alleged, committed the said grievances in the declaration mentioned. To this replication the defendant demurred, and assigned for cause that the plaintiff had attempted to put in issue three distinct allegations, contained in the defendant's plea, viz., the plaintiff's trading, his bankruptcy, and the petitioning creditor's debt.

*Manning*, in support of the demurrer, cited *Cockerill v. Armstrong*; that was trespass for taking a gelding, and the defendant pleaded that the *locus in quo* was one hundred acres, and that J. S. was seised thereof in fee, and that the defendant as his servant, and by his express orders, took the gelding damage-feasant. The plaintiff replied *de injuria sua propria absque tali causa*; and it was held that the replication was bad, because it put in issue three or four things. In this case the replication puts in issue the trading, the act of bankruptcy, and the petitioning creditor's debt, and therefore is bad.

*Campbell*, contra, was stopped by the court.

*Per Curiam.* Those three facts connected together constitute but one entire proposition, and therefore the replication is good. In *Crogate's Case*, it is laid down that the general replication, *de injuria sua propria*, is proper, when the defendant's plea consists of matter of excuse, and of no matter of interest whatever. Here the plea consists of matter of excuse only. In *Robinson v. Rayley*, the defendant in trespass pleaded a right of common for his cattle levant and couchant. The plaintiff replied that they were not his own commonable cattle levant and couchant. The defendant demurred specially, because the replication was multifarious; but the court held the replication good, the rule being not that issue must be joined on a single fact, but on a single point, and that it was not necessary that this single point should consist only of a single fact; and Lord Mansfield says, "Here the point is, the cattle being entitled to common: this is the single point of the defence; but in fact they must be both his own cattle, and also levant and couchant, which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite." So in this case the point is, whether the plaintiff duly became bankrupt; and in order to establish that, there must be a trading, an act of bankruptcy, and a good petitioning creditor's debt; and these three circumstances are essential to constitute him a bankrupt. The judgment, therefore, must be for the plaintiff.

*Judgment for the plaintiff.*<sup>1</sup>

<sup>1</sup> *Whittaker v. Mason*, 2 B. N. C. 859; *Griffin v. Yates*, 2 B. N. C. 579; *Stickle v. Richmond*, 1 Hill, 77, *accord.* — Ed.

De Injuria never bad for du-  
plicity for if plea is duplex  
then De Injuria is as good  
as plea + cannot traverse  
more defended than plea  
gets up.

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Declaration is Replevin for taking  
Pltf's goods & chattels.

Alleg. that poor-rate was assessed.

Pltf. failed to pay in demand.  
Warrant was given by Justice  
against Pltf. for rate - that under  
this Warrant Deft. Entered &  
Took goods & now claims  
them back.

Plea. De injuria.

Held that the ~~plea~~ <sup>plea</sup> ~~and~~ of  
de injuria is good. The  
multiplicity of issues ten-  
dered is immaterial they  
all go to make one defence.  
Since Deft. claimed no int.  
vest prior to his alleged  
wrongful taking but an  
interest springing from that  
there was no such interest  
claimed as would make  
de injuria bad.

## H. C. SELBY, Esq., v. BARDONS AND ANOTHER.

IN THE KING'S BENCH, HILARY TERM, 1832.

*[Reported in 3 Barnewall & Adolphus, 2.]*

DECLARATION in replevin for taking the plaintiff's goods and chattels in Verulam Buildings, Gray's Inn, in the county of Middlesex, and detaining the same against sureties and pledges. The fourth avowry and cognizance were by the defendant Bardons, as collector of the poor-rates of that part of the parish of St. Andrew, Holborn, which lies above the bars, in the county of Middlesex, and of the parish of St. George the Martyr in the said county, and by the other defendant as his bailiff; and it stated that the plaintiff was an inhabitant of the said part of the parish of St. Andrew, Holborn, and by law ratable to the relief of the poor of that part of the said parish, and of the parish of St. George the Martyr, in respect of his occupation of a tenement situate in the said place in which, &c., and within the said part of the parish of St. Andrew; that a rate for the relief of the poor of that part of St. Andrew, Holborn, and of the parish of St. George the Martyr, was duly ascertained, made, signed, assessed, allowed, given notice of, and published according to the statutes; and that by the said rate the plaintiff was, in respect of such inhabitancy and occupation as aforesaid, duly rated in the sum of £7; that Bardons, as collector, gave him notice of the rate, and demanded payment, which he refused; that the plaintiff was duly summoned to appear at the petty sessions of the justices of the peace for the said county, to be holden at a time and place duly specified, to show cause why he refused payment; that he appeared, and showed no cause; that a warrant was duly made under the hands and seals of two justices of peace for the county then present, directed to Bardons as collector, requiring him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to Bardons, under which he, as collector, avowed, and the other defendant, as his bailiff, acknowledged the taking of the goods as a distress, and prayed judgment and a return of the goods. The plaintiff pleaded in bar that the defendants of their own wrong, and without such cause as they had in their avowry and cognizance alleged, took the plaintiff's goods and chattels, &c. To this plea there was a special demurrer, and the causes assigned were, that the plea in bar tendered and offered to put in issue several distinct matters, — the inhabitancy of the plaintiff; his chargeability to the relief of the poor, in respect of his occupation mentioned in the avowry and cognizance; the ascertainment, making, signing, assessing, allow-

ance, notice, and publication of the rate; the rating and assessment of the plaintiff; the notice to him of the rate; the demand and refusal of the sum assessed; the summons, the appearance before the justices, the warrant of distress, and delivery thereof to the defendant Bardons. Another cause assigned was, that the plea in bar was pleaded as if the avowry and cognizance consisted wholly in excuse of the taking and detaining, and did not avow and justify the same, and claim a right to the goods and chattels by virtue of the statutes. To the fifth and sixth avowries and cognizances, which were similar in form to the fourth, the plaintiff pleaded *de injuria*; and there were special demurrers, assigning the same causes as above. The plaintiff joined in demurrer.

The case was argued in last Michaelmas term by *Coleridge* in support of the demurrer, and *Maule*, contra. The judges not being agreed in their opinions, now delivered judgment seriatim. The points urged and the authorities cited in argument are sufficiently stated and commented on in the opinions delivered by them.

PATTESON, J. The pleas in bar to the fourth, fifth, and sixth cognizances are so entirely at variance with one of the principal objects of special pleading, viz., that of bringing the parties to clear and precise issues of fact or of law, that I cannot bring my mind to consider them as maintainable upon principle. But if, upon the authority of decided cases, it should appear that they are maintainable, I am not prepared to overrule those cases upon any opinion that I may entertain respecting the inconvenience of so general a form of issue; and I am free to confess that, after an attentive examination of the authorities, I am of opinion that the pleas are maintainable.

The leading case upon the subject (I mean *Crogate's Case*, for the Year-Books throw little light on the subject) is by no means consistent in all its different parts, and much that is contained in the four resolutions is unnecessary to the decision of the case itself.

The pleadings were in substance as follows: Trespass for driving cattle. Plea, a right of common as copy-holder in a piece of pasture into which the plaintiff had put his cattle; and that defendant, as servant of the commoner, drove them out. Replication, *de injuria sua propria absque tali causa*.

The first resolution is in substance this: that the replication *de injuria absque tali causa* refers to the whole plea; for all is but one cause. The second resolution is, that where any interest in land, or common, or rent of or way over land is claimed, *de injuria* is no plea; for it is properly when the plea does consist of matter of excuse only, and no matter of interest whatever. The third resolution is, that where the defendant justifies under authority from the plaintiff, *de injuria* is no





plea; so where he justifies under authority of law. The fourth resolution is, that the issue in the case then at bar would be full of multiplicity.

Upon the authority of this case, if the pleas in bar now under consideration be bad, they must be so on one of the following grounds:—

Either that the avowries claim some interest, or that the defendant justifies under authority of law within the meaning of the third resolution, or that they are bad for multiplicity.

In the first place, as to any claim of interest, it is plain that the avowries claim no interest whatever in land, the sort of interest to which the second resolution is in words confined. But, supposing any interest in goods were within the spirit of that resolution, still, I apprehend that it must be an interest existing antecedent to the seizure complained of, and not one which arises merely out of that seizure; otherwise this plea could never be good in replevin where a return of goods is claimed, and, of course, an interest in them is asserted. Indeed, it seems to be considered in some text-books that this plea in bar can never be used in replevin; but on reference to the authorities cited for that position, they all appear to be cases where an interest in land was claimed by the avowry. In this respect, I confess that I cannot see any distinction between an action of replevin and one of trespass; and as the plaintiff can bring either at his election, it would be strange if he should be able by suing in trespass to entitle himself to the general form of replication, but if he sues in replevin should be debarred from it. The case of *Wells v. Cotterel*<sup>1</sup> was cited at the bar to establish that the plea of *de injuria* is good in replevin; but it appears in that case that three of the judges held it good against the opinion of the fourth, but that all the court held the avowry bad, and therefore no decision was necessary as to the plea. On the other hand, the case of *Jones v. Kitchin* is commonly referred to as establishing the position that this plea in bar can never be used in replevin; but it does not go that length, for the avowry there was for rent in arrear, and, therefore, *de injuria* would have been equally bad had the form of the action been trespass. For, in *White v. Stubbs*,<sup>2</sup> which was an action of trespass, *de injuria* was held to be a bad replication, the plea claiming an interest in land, and justifying the taking the goods as encumbering a room to which the defendant showed title.

As, therefore, the avowries in this case show no interest in land or in the goods seized, except that which arises from claiming a return; and as I find no authority for saying that such claim of return is an interest

<sup>1</sup> 3 Lev. 48.

<sup>2</sup> 2 Saund. 294.

within the meaning of the second resolution in Crogate's Case, it seems to me that the avowries show matter of excuse only, and that, as to this ground of objection, the general pleas in bar of *de injuria* are good.

In the next place, are the general pleas bad on account of any authority in law shown by the avowries?

It is certainly stated in the third resolution in Crogate's Case, that the replication *de injuria* is bad where the plea justifies under an authority in law; but this, if taken in the full extent of the terms used, is quite inconsistent with part of the first resolution, which states, that where the plea justifies under the proceedings of a court not of record, the general replication may be used, or where it justifies under a *capias* and warrant to sheriff, all may be traversed except the *capias*, which cannot, because it is matter of record and cannot be tried by a jury. Now, the proceedings of a court not of record, and the warrant to a sheriff and seizure under it, are surely as complete authorities in law as any authority disclosed by the present avowries. With respect to the proceedings of a court not of record, a quære is made in *Lane v. Robinson*,<sup>1</sup> whether a replication *de injuria* would be good; but the point did not arise in the case, and the Year-Books referred to in Crogate's Case warrant the conclusion that it would. In Bro. Abr. title *De Son Tort Demesne*, there are instances of this replication to a plea justifying by authority of law. There is also the case referred to in the argument at the bar, of *Chancy v. Win and Others*, in which it is laid down by Lord Holt, that *de injuria* is a good replication in many cases where the plea justifies under an authority in law. I do not therefore think that the present pleas are objectionable on that ground.

In the last place, are the pleas bad on account of the issue, tendered by them, being multifarious?

If this were *res integra*, I should have no hesitation in holding that they were bad; and it cannot, I think, be denied that the present issues are as full of multiplicity as that in Crogate's Case, and to which the fourth resolution there applied. But I am unable to find any instance in which this general replication has been held bad on that ground. The objection is indeed mentioned in the cases cited from Lord Chief Justice Willes's reports, but in no one of those cases does the decision proceed on that objection alone, and in all of them there were other undoubted objections. In *Cooper v. Monke*,<sup>2</sup> the plea justified under a distress for rent, and the general replication was clearly bad within the second resolution in Crogate's Case. In *Cockerill v.*

<sup>1</sup> 2 Mod. 102

<sup>2</sup> Willes, 52.





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Probably best discussion of  
plea to be found.

1 East 212.  
may be used in  
rejoinder.

Armstrong, the plea justified under a seizure of cattle damage feasant in a close of which the bailiffs and burgesses of Scarborough were alleged to be seised in fee; an interest, therefore, was claimed in the land, and the general replication was bad within the same resolution; and Lord Chief Justice Eyre, in commenting on that case in *Jones v. Kitchin*, expressly states that the replication was bad on that ground, and not because it put two or three things in issue, for that may happen in every case where the defence arises out of several facts all operating to one point of excuse. In *Bell v. Wardell*,<sup>1</sup> the pleas set up a custom, which was held bad, and, therefore, any decision as to the general replication became unnecessary.

It is every day's practice where the plea justifies an assault in defence of the possession of a close, or removing goods doing damage to it, to reply *de injuria* generally, and yet this objection as to the multifarious nature of the issue would apply in both cases. The same observation holds good where this general replication is used in actions for libel or slander, in which a justification is pleaded.

Many cases are referred to in Com. Dig. tit. Pleader, (F) 18, and several following numbers, and, again, 3 (M) 29, in none of which do I find that the general form of replication has ever been held bad on account of its putting in issue several facts.

The cases of *Robinson v. Rayley*,<sup>2</sup> and *O'Brien v. Saxon*, are authorities to show that it cannot be objected to on that account, provided the several facts so put in issue constitute one cause of defence, which, as it seems to me, they always will, where the plea is properly pleaded, however numerous they may be, since if they constitute more than one cause the plea will be double.

The present avowries state many facts undoubtedly, but they are all necessary to the defence, and combined together they show but one cause of defence, namely, that the plaintiff's goods were rightfully taken under a distress for poor-rates; and if the general replication be held bad in this case, I am at a loss to see in what case such a replication can be held good, where it puts more than one fact in issue. I am compelled therefore, however reluctantly, to come to the conclusion that the pleas in bar are good.

PARKER, J.,<sup>3</sup> after stating the pleadings, proceeded as follows:—

The question for our decision is, whether the objections pointed out in the special demurrer, and which have been insisted upon in the argument before us, are well founded in law? It appears to me, upon an examination of the authorities, that they are not, and that the pleas in bar are good.

<sup>1</sup> Willes, 202.

<sup>2</sup> 1 Burr. 816.

<sup>3</sup> Taunton, J., delivered no judgment, having been consulted in the cause when at the bar.

→ It is true that these pleas in bar put in issue a great number of distinct facts; and it is also true that the general rule is, that where any pleading comprises several traversable facts or allegations, the whole ought not to be denied together, but one point alone disputed; and I am fully sensible that the tendency of such a rule is to simplify the trial of matters of fact, and to save much expense in litigation. But it is quite clear, that from a very early period in the history of the law, an exception to this general rule has been allowed with respect to all actions of trespass on the case, in the plea of the general issue; and with respect to some actions of tort, in the replication of *de injuria sua propria absque tali causa*. This replication, where it is without doubt admissible, generally, indeed it may be said always, puts in issue more than one fact, and often a great number. For instance, in an action of assault, where there is a justification that the defendant was possessed of a house; that the plaintiff entered; that the defendant requested him to retire, and he refused; that the defendant laid his hands on the plaintiff to remove him, and the plaintiff resisted; — all these facts may be denied by this general replication. Com. Dig. Pleader, (F) 18. *Hall v. Gerard*.<sup>1</sup> So, where an obligation to repair fences, and a breach of the fences by the plaintiff is pleaded as an excuse for a trespass with cattle. *Rastell*, 621 a, Com. Dig. Pleader, 3 (M) 29. So, if there be a justification of assault and false imprisonment, on the ground of a felony committed, and reasonable suspicion of the plaintiff; *Bro. Abr. De Son Tort*, 49. So as to other justifications in the like action; *Ibid.* 18, 20. Under the precept of an admiralty court, or under a precept after plaint levied in a county or hundred court, *Rastell*, 668 a, many facts may be put in issue by the general replication, and there appears no question about the validity of such a replication; *Crogate's Case*. The case of *O'Brien v. Saxon* is a further authority to the same effect, that many facts may be included in one issue; and if many facts may be traversed, it can be no valid objection that more than usual are denied in any particular case.

I must not, however, omit to notice, there is a dictum of Lord Chief Justice Willes in the case of *Bell v. Wardell*,<sup>2</sup> that the general replication of *de injuria* was bad on this ground, and also in that of *Cockerill v. Armstrong*; but Lord Chief Justice Eyre, in *Jones v. Kitchin*, disapproves of that dictum, and says that the reason is not that the replication puts two or three things in issue; and both these cases may be supported on another ground, namely, that in one a right in the nature of a right of way, in the other a seisin in fee, would be included in the traverse.

<sup>1</sup> *Latch*, 128, 221, 272.

<sup>2</sup> *Willes*, 204.

As to necessity ordinary of  
transferring only one fact.

By jury instead of by Judge.

Lawrence is really not of  
authority but of facts.

It seems clear to me, therefore, that this general traverse in actions of tort is not bad on account of the multiplicity of the matters put in issue; and unless there be some distinction between actions of replevin and actions of tort (a point I shall afterwards consider), the first ground of objection must fail.

The second ground is, that the avowry and cognizance claim an interest in the goods, and that for this reason the pleas in bar are not admissible. Upon the best consideration I have been able to give to the authorities on this subject, which are (many of them) obscure and contradictory, I do not think that any interest is claimed in these pleadings, within the meaning of that word in the rules laid down on this subject. In *Crogate's Case*, the principal authority, three cases are mentioned in which the general traverse is not allowed.

The first is, where matter of record is parcel of the issue; and that for the obvious reason, that if it were permitted, it would lead to a wrong mode of trial.

The second case is, where the defendant in his own right, or as servant to another (who is by that decision put on the same footing as his master), claims an interest in the land, or any common, or rent going out of the land, or any way or passage upon the land.

The third case is, where, by the defendant's plea, any authority or power is mediately or immediately derived from the plaintiff. Under this description is included any title by lease, license, or gift from the plaintiff; Bro. Abr. *De Son Tort Demesne*, 41; or lease from his lessee; 16 Hen. VII. 3. Bro. Abr. *De Son Tort Demesne*, 53. It is also added in *Crogate's Case*, that the same law is of an authority given from the law, as to view waste; but in the case cited from the Year Book, 12 Ed. IV. 10 b, as supporting this position, the plea stated that the plaintiff claimed as tenant by statute merchant, and defendant justified his entry under his right to view waste, so that matter of record would have been in issue under the general replication. This explanation of the case was given at the bar in *Chancy v. Win*, and in the same case Lord Holt says, that the case of a right of entry to view waste is upon a special reason, because the seisin of the lessor would be involved in the issue. As a general proposition, indeed, it is untrue that authority of law may not be included in the traverse, it being clear that an arrest by a private individual or a peace officer is by an authority from the law; and yet pleas containing such a justification may be denied by a general traverse.



Lord Coke says, after laying down these three rules, that the general plea *de injuria, &c.*, is properly when the defendant's plea doth consist merely of matter of excuse, and of no matter of interest whatever. By this I understand him to mean an interest in the realty, or an in-

terest in, or title to chattels, averred in the plea, and existing prior to, and independently of the act complained of, which interest or title would be in issue on the general replication; and I take the principle of the rule to be, that such alleged interest or title shall be specially traversed, and not involved in a general issue.

It is contended, however, on the part of the defendants, that the interest here meant is one that the party would acquire by the seizure which forms the subject of complaint, and that the replication would be improper whenever the defendant justified under any proceedings by which, if rightful, he would acquire an interest or a special property.

If this were the meaning of the term "interest," a general replication would be bad to a plea to an action of trespass justifying seizure under process of the Admiralty Court, or of any inferior jurisdiction not of record. So in case of a justification of taking beasts in withernam (16 Hen. VII. 2). So of a justification of seizure for salvage; Lilly's Entries, p. 349. And yet in all these cases it appears to be settled that the general traverse is permitted.

→ It seems to me, therefore, that the objection is applicable to those cases only where a party justifies as having an interest, or under one who has an interest, by title at the time of the act complained of, which interest would therefore be put in issue by the general traverse.

No case or precedent cited on the argument, or any that I am aware of, is against this construction of the rule. In *Cockerill v. Armstrong*, indeed, before referred to, which was the case of a distress, damage-feasant, and impounding, Lord Chief Justice Willes says (among other observations) that the taking away and impounding seemed to imply a claim of right; but there the plea stated a seisin in fee in the bailiffs of Scarborough, which would have been in issue; and it is on that ground that the decision of the court is to be supported; and so Lord Chief Justice Eyre seems to have thought in *Jones v. Kitchin*.

It appears to me, then, that in an action of trespass *de bonis asportatis*, a similar justification to the present might be traversed by the general replication, as no matter of interest in the goods seized would be included in that traverse; and the only remaining question is, whether it makes any difference that the form of action is in replevin.

Some modern treatises lay it down as a general rule, that this form of pleading is inadmissible altogether in replevin;<sup>1</sup> but the authorities cited for this position do not bear it out. ← Finch's Law, §96, is one; after stating that in all actions of trespass merely transitory, although the defendant pleads any special matter, the plaintiff may reply generally, except where the justification is by matter of record or writing

<sup>1</sup> Chitty on Pleading, 622, 5th ed.

cf. as to Chattels



dissenting.

(by which he means writing in the like nature) or by some title or license from the plaintiff himself, he proceeds to state that in all local trespasses where title is claimed, the special matter must be answered; and "in replevin, which is real, the title or special matter must be always traversed." I do not think this means to include all replevins, but those only where the avowry claims title to the realty. In *Jones v. Kitchin*, a case of replevin, the plea in bar was held bad, not because it was not pleadable in replevin, but because it would put in issue a title or interest in land; and the proposition in the judgment in that case, that this plea could only be allowed in actions for personal injuries, is certainly too limited, as many authorities have been cited to show that it is applicable to trespasses to goods.

Indeed, it was conceded in the argument, that in some cases of replevin such a plea in bar would be admissible; and if admissible at all, there seems to me no reason why it should not be governed by the same rules as in an action of trespass to goods; viz., that it should not be admitted where matter of record, title, interest, or authority from the plaintiff should be put in issue by that plea in bar, but it should be in all others.

And there are some precedents in actions of replevin, of such a plea in bar, which were cited on the argument. In Lilly's Entries, 349, there was an avowry for salvage, with a prayer of judgment of a return, and such a plea in bar. In *Wells v. Cotterill*,<sup>1</sup> there was a similar plea in bar, which was held bad on the ground that it traversed matter of title, but it does not appear to have been objected to for the general reason that such a plea was inadmissible in that form of action. Upon the whole, therefore, my opinion is, that the plea in bar is good in this case, as it puts in issue no matter of title or interest in the goods, and therefore that there should be judgment for the plaintiff.

LORD TENTERDEN, C.J. I consider the system of special pleading, which prevails in the law of England, to be founded upon and to be adapted to the peculiar mode of trial established in this country, the trial by the jury; and that its object is to bring the case, before trial, to a simple, and as far as practicable, a single question of fact, whereby not only the duties of the jury may be more easily and conveniently discharged, but the expense to be incurred by the suitors may be rendered as small as possible. And experience has abundantly proved, that both these objects are better attained where the issues and matters of fact to be tried are narrowed and brought to a point by the previous proceedings and pleadings on the record, than where the matter is left at large to be established by proof, either by the plaintiff in main-

<sup>1</sup> 3 Lev 48. Lev. Entr. 185.

tenance of his action, or by the defendant in resisting the claim made upon him. I am sensible that this principle has not always been kept in view by the courts, and that there have been, in practice, many instances of departure from it, founded upon very nice and subtle distinctions. The decisions of our predecessors, the Judges of former times, ought to be followed and adopted, unless we can see very clearly that they are erroneous, for otherwise there will be no certainty in the administration of the law; and if I had found the question in this cause distinctly decided in any former case, I should have thought it my duty to abide by the decision, especially in a matter regarding rather the course of proceeding than a question of pure law. But after an attentive consideration of the cases quoted at the bar, and of such others as I have been able to meet with after a very diligent search, I do not find that this has been done. I find, indeed, many decisions and dicta not easily reconcilable with each other, founded, as I have already observed, upon very nice and subtle grounds, and not capable of being reduced to any plain, or, to my mind, any solid principle. There is one matter in which all the authorities in our books agree. If an action of trespass be brought for turning sheep or cattle to feed upon land in the possession of the plaintiff, and the defendant justifies the act by pleading that A. B., his landlord, was seised of certain lands, and demised the same to him for a term not yet expired, and that he thereupon entered and was possessed of the demised lands; and then goes on to allege, in the ordinary form of prescription, that his landlord had right of common on the plaintiff's land for cattle levant and couchant on the demised land, and that he put the cattle on the plaintiff's land in the exercise of that right; in such a case, I say, it is agreed by all the decisions that the plaintiff cannot reply generally *de injuria sua propria absque tali causa*, but must traverse some one of the facts alleged in the plea, admitting, for the purpose of the cause, all the others. In such a case, at least three separate and distinct facts are alleged: the seisin of the landlord, the demise to the defendant, the immemorial right of common. Every one of these three is necessary to the defence; but the plaintiff must elect which of them he will deny, and when he has so done, the cause goes down to the jury for the trial of that single fact; the jury are not embarrassed by a multiplicity of matter, and the parties are relieved from much of the expense of proof, to which they would be subjected if all the facts alleged in the plea were to be matters of proof and controversy before the jury. In the case now before the court, the avowry alleged that a poor-rate was made; that it was allowed by the justices; that the plaintiff was assessed in it for his messuage in which the distress was taken; that this messuage was within the parish; that payment of the

Must deny one fact only.

little to Lattis →

assessment was demanded and refused; that a warrant of justices was issued to levy it, and that the goods were taken under the authority of that warrant. Many distinct and independent facts are thus alleged in the avowry, every one of which is necessary to sustain the right to take the goods, and to entitle the defendant to have them returned to him; and if this general plea in bar be good, the defendant must prove every one of them at the trial, and the jury must consider and decide upon each before a verdict can properly be given. Now, I think I might safely venture to ask any plain and unlettered man, whether he could find any difference between the two cases that I have put, either in common understanding or in sound logic. For myself, I must say that I can find none. If no such distinction exists or can be found, why should a different rule prevail? why should all the matters of fact be sent together to the jury in the one case and not in the other? To this question I am persuaded that no satisfactory answer could be given to the mind of an unlettered man. To a Judge, who is to act upon the decisions of his predecessors, a binding if not a satisfactory answer might be given, by showing that the matter had been already so decided; but this, as I conceive, has not yet been done.

I find it decided, that where, in an action of trespass, the defendant's plea contains merely matter of excuse, and not matter of right, a replication in this form may be good: and to this there may, perhaps, be no objection in principle, because the matter of excuse may, and generally will be, the only matter to be tried, any previous allegation being a matter of inducement only. I find it also laid down, that where the defendant claims any interest in land by his plea, this general replication will not be good; but it is said that it may be otherwise in the case of goods. Why there should be such a distinction I am not able to comprehend. The defendant in this case does, certainly in one of the avowries, claim an interest in the goods, because he claims to have them returned to him; but I do not rely on this. For the reasons which I have thus, perhaps imperfectly, given, and which are founded upon what I conceive to be principle, and not upon authorities, and which, therefore, render it unnecessary for me to advert to particular cases, I feel myself reluctantly bound to differ from my two learned Brothers; and it is a satisfaction to me to know that my opinion, which it is my duty to give as I entertain it, cannot prejudice the plaintiff, because, notwithstanding my opinion, the judgment of the Court on these demurrers must be given for the plaintiff. I would only add, that my view of the case would be the same if this were a replication to a plea in trespass, or if the defendant had pleaded instead of avowing, and so had not claimed a return of the goods.

*Judgment for the plaintiff.*<sup>1</sup>

<sup>1</sup> Affirmed in Exchequer Chamber, 1 C. & M. 500; s. c. 9 Bing 756. — Ed.

## PIGOTT v. KEMP AND OTHERS.

IN THE EXCHEQUER, MICHAELMAS TERM, 1832.

[Reported in 3 Tyrwhitt, 128.]

TRESPASS for assault and battery. The fifth plea stated, that J. E. and S. B., before and at the several times when, &c., were possessed of a certain dwelling-house and close, with the appurtenances, situate and being at &c., and being so possessed thereof, the said plaintiff, just before the said several times when &c., to wit, on &c., was unlawfully in the possession of the said last-mentioned dwelling-house, and with force and arms making a great noise and disturbance therein, and at the said times when &c. was therein making such noise and disturbance without the leave or license, and against the will of the said J. E. and S. B., and thereupon the said defendants, as the servants of the said J. E. and S. B., and by their command, then and there requested the said plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said dwelling-house and close, which the said plaintiff then and there wholly refused to do, whereupon the said defendants, as the servants of the said J. E. and S. B., and by their command, in the defence of the possession of the said last-mentioned dwelling-house, gently laid their hands on the said plaintiff in order to remove him from the dwelling-house; and because he the said plaintiff was then and there armed with divers, to wit, two loaded pistols, and then and there assaulted the said defendants with the said pistols, and used violent and menacing language and gestures, and put them the said defendants in alarm and peril of their lives, they the said defendants, in order to protect and defend themselves, and because they could not otherwise protect and defend themselves, wrested and took the said pistols from the said plaintiff, and in so doing necessarily and unavoidably seized and laid hold of the said plaintiff by his arms and a little squeezed the same, and necessarily and unavoidably gave and struck the said plaintiff a few blows and strokes, and necessarily and unavoidably a little shook and gently pulled about him the said plaintiff, and necessarily and unavoidably a little rent, tore, and damaged the clothes and wearing apparel of the said plaintiff, and necessarily and unavoidably a little beat, bruised, wounded, and ill-treated him the said plaintiff, doing no unnecessary damage to the said plaintiff on the occasion last aforesaid; which are the said supposed trespasses in the introductory part &c. mentioned.

Replication *de injuria*, and special demurrer thereto. The points marked to be contended by defendant were, first, the duplicity of

Declan for Assault & Battery,  
Plea that Plet. was wrongfully  
in a house of J.E. & D.B. & Dept. &  
their servants Ejected him.

Repli. De injuria. Deceases.  
Argument that there were many  
facts put in issue by Repli.  
that Command was involved  
& title involved.

Deceases with drawn &  
pleaded over. Ct. inclined  
to think De injuria good.

Replication held good although  
put in issue ~~title~~ of real estate.  
possession



Multiplicity no defect.



Shows that possession may  
be denied by de injuria.

the replication, in not admitting or protesting any of the allegations in the plea, but involving them all in the issue. Next, that the replication put in issue authority and command, which ought to have been separately traversed; and also put in issue with other matter title and interest in land.

*Byles*, in support of the demurrer. This replication is multifarious, in imposing on the defendants a necessity to prove eight distinct allegations stated in their plea; so that while the plaintiff may content himself with adducing evidence to disprove any one of them, the defendants must go to trial prepared to support every one, without knowing the particular one against which the plaintiff directs his attack. [BAYLEY, B. The putting in issue a multiplicity of facts in one plea does not make it bad if they all lead to one conclusion, and together amount to but one defence; Selby v. Bardons.] That rule was the ground of the decision in that case (though Lord Tenterden differed), and previously in *Robinson v. Rayley*, and *O'Brien v. Saxon*; but in all those cases possession of the party at the time was alleged; whereas it is wanting in this plea, which alleges many distinct matters not reducible to one proposition. [LORD LYNDEHURST, C. B. The plea imports an actual possession by Easto and Bullen as well as the plaintiff at the time; and the replication is constantly in this form, where the defendants rely on possession only. Is there any doubt except as to the command? BAYLEY, B. Are the facts in this plea any more than one excuse for a trespass?]

But the issue, if not multifarious, involves authority and command. Now command generally cannot be involved in the issue, but, if at all, must be separately traversed. The text-books say, if a man justify by warrant of another, *de injuria* is not proper.<sup>1</sup> Mr. Serjt. Williams, in 2 Saunders, 295 b, adopts the declaration of Eyre, C. J., in *Jones v. Kitchin*, that that replication is not allowed, if the plea relate "to any commandment." [BAYLEY, B. Crogate's Case shows that an authority mediately or immediately emanating from the plaintiff must not be involved in the issue. Here the command is from a stranger.] It is difficult to perceive why, if the command of the plaintiff may not be involved in the issue, the command of a stranger may. In both cases two questions are involved, — the existence of the party to give the command, and that of the command itself. But before, as well as after, Crogate's Case, there are authorities to show that a command cannot be so traversed, though not derived from the plaintiff. Fitzherbert's Abridgment, tit. Issue, pl. 163. Brooke's Abridgment, tit. *De Son Tort Demesne*, pl. 42. Again, 23 Hen. VIII. c. 5, § 11, implies

<sup>1</sup> Stephen on Pl. first ed. 188, 276; 1 Ch. on Pl. 514.

that the general replication *de injuria*, specially provided by that act in actions for trespasses done by authority of the commissioners of sewers, was not good at law. [LORD LYNTHURST, C. B. That might have been inserted to remove all doubt.] Finch's Law, 395, states that a warrant from a justice cannot be so traversed, and it is put on the same ground as a license from the plaintiff. *Chancy v. Win* is the same way. The justice's warrant is either a matter of record or not; if it is, *Selby v. Bardons* is wrong; if it is not, then the command of a stranger is not traversable by the general replication *de injuria*. [LORD LYNTHURST, C. B. On the principle laid down there by Lord Tenterden himself, we should, in cases like this, adhere to the decisions. What a justice returns to quarter sessions may be matter of record. BAYLEY, B. I am not aware that a single justice forms necessarily a court of record; though, if he acts judicially, it may be different from the committing a man charged with an offence. In the case from Brooke, the Court held that it should be put in issue that the ancestor did not hold by knight's service, or, that he did not command; but that the tenure and command could not both be put in issue.] There is no intimation in the above authorities that the command to be so traversable must be derived mediately or immediately from the plaintiff.<sup>1</sup> [BAYLEY, B. Where defendant claims by authority from the plaintiff himself, *de injuria* generally is not a good replication.]

Secondly, a claim of interest in land being apparent on the face of the plea, the traverse in this replication, though general, involves the title of Easto and Bullen to the possession of land, and is therefore contrary to the second resolution in Crogate's Case. In *Hall v. Gerard*,<sup>2</sup> cited by Parke, J., in *Selby v. Bardons*, the fact of possession was held to be traversable; but the party alleged to have possession was, in that case, removed from the actual enjoyment of the land. Here, unless Easto and Bullen were rightfully in possession, their command would be no defence; now not even they are alleged to have been actually in possession of the land, but the plaintiff is stated to have been in possession; and as the allegation that his possession was unlawful is in fact traversed by him, Easto and Bullen appear to have had only a right of possession, or a possessory title which cannot be traversed generally. [LORD LYNTHURST, C. B. All three were in possession. BAYLEY, B. The mistake of stating the plaintiff to be in possession may be so material that we might not give judgment on such a record.<sup>3</sup>] The title of the plaintiff is also involved in this issue, for

<sup>1</sup> Comyns' Digest, tit. Pleader (F. 22), was cited by Bayley, B.

<sup>2</sup> Latch, 221.

<sup>3</sup> It was here agreed that it should be considered as if the defendant had pleaded that plaintiff was wrongfully there making noise, &c.



Shows that Command centres  
from plif. is trans. abli. by →  
de injuria.

the title to the land is not laid in the defendants, but in other persons, and the fact and legality of the plaintiff's possession are in issue, and must be proved as matter of substance. They are not mere inducements, as in *Taylor v. Markham*. [BAYLEY, B. The plea is a chain of many links or facts making a single defence, and the plaintiff was not bound to single out any particular one. LORD LYNTHURST, C. B. All the facts stated in the plea conduct to, and terminate in, the battery, which is the subject of charge; so that, independently of the command, the whole of them constitute one defence.]

*Biggs Andrews*, contra, was directed to confine himself to the question whether the command could be traversed by the general replication. *Selby v. Bardons* is directly in the affirmative, the command being involved in that issue. All the cases have distinguished between justification under matters of record, and under things not matter of record. *Chancy v. Win* is also in point, for Lord Holt took notice of the command being there traversed. [BAYLEY, B. That issue was said to involve matters of record, for one defendant justified as a commissioner of excise, and the other as his servant under his warrant.]

In *Archbishop of Canterbury v. Kemp*,<sup>1</sup> Coke said, *arguendo*, that *de injuria* was not a good replication where the defendant's plea claims for him an interest in the freehold; "but where one claims not any interest, but justifies by command or authority derived from another, it is otherwise." *Doctrina Placitandi* (pp. 113, 115) treats an authority derived from the plaintiff himself as distinct from one derived from another person, for the former affords a defence alone, while the latter is only one link in a chain of facts which, together, compose one justification. The defendants go too far in citing cases tending to show that the command could not be traversed at all, for *Chambers v. Donaldson*<sup>2</sup> overturned a similar doctrine in trespass to real property. This plea states merely one excuse resulting from a series of facts pleaded.

*apparently means "to him."* [BAYLEY, B. If the command was not traversable, a man might justify the expulsion of a party in possession under the command of a perfect stranger. If the command was traversable, but only in the manner contended for, the result would be that, in trespass against a master and his servant justifying under his authority, the traverse in the replication might be general as against the master, but not against the servant. However, in many actions brought against several defendants for taking goods, all rely on a judgment recovered and *fi. fa.* issued against the plaintiffs, but justify in different characters, *e. g.*, one as sheriff, another as plaintiff, and others as acting under the sheriff's

<sup>1</sup> Cro. El. 539.

<sup>2</sup> 11 East, 65.

authority. Is it not common to reply, admitting the judgment and writ, and stating that the defendants, *de injuria sua propria et absque residuo causæ*, committed the trespasses; thus, by one general traverse, involving in one issue the seizure as well as the command?]<sup>1</sup>

The Court expressed a strong opinion against the demurrer, but, under the circumstances, gave leave to withdraw it, and amend, on payment of costs.

*omit.*

### PENN v. WARD.

IN THE EXCHEQUER, TRINITY TERM, 1835.

[Reported in 2 Crompton, Meeson, & Roscoe, 383.]

TRESPASS for assault and battery. Pleas, first, not guilty; secondly, that the plaintiff was the apprentice of the defendant, and conducted himself improperly and saucily, wherefore the defendant moderately chastised him, as he was justified in doing, &c. Replication to the latter plea, *de injuria*; on which issue was joined. At the trial, before Tindal, C. J., at the last Warwick Assizes, it was proved that the plaintiff was the defendant's apprentice, and having behaved in a saucy manner, was beaten by the defendant; and the plaintiff's counsel proposed to show that the defendant, in beating him, had used excessive and unjustifiable violence. It was objected that such evidence could not be given on these pleadings, there being no replication of excess. The learned Judge, however, admitted the evidence, and left it to the jury, who found a verdict for the plaintiff, damages one shilling.

In Easter term, *Adams*, Serjt., obtained a rule *nisi* for a new trial on the ground of misdirection, contending that the question of excess was not open on these pleadings; and cited *Dale v. Wood*,<sup>2</sup> *Franks v. Morris*,<sup>3</sup> *Piggott v. Kemp*, *Selby v. Bardons*, *Bowen v. Parry*,<sup>4</sup> *Lamb v. Burnett*.<sup>5</sup> Cause was now shown by

*Humfrey* and *Miller*. The jury have found that the defendant corrected the plaintiff as an apprentice, but not moderately. And it is submitted that, on these pleadings, not only the cause alleged in the plea, but also the moderateness of the chastisement, is put in issue. The replication *de injuria* is a good answer to any plea which justifies on matter of fact only; Com. Dig. Pleader, F. 19; *Jones v. Kitchin*.

<sup>1</sup> See an instance, 8 Chitty on Pleading, 1204, 4th ed.

<sup>2</sup> 7 B. Moore, 88.

<sup>3</sup> 10 East, 81, n.

<sup>4</sup> 1 Carr. & P. 394.

<sup>5</sup> 1 C. & J. 291.

Assault & Battery.

Plea moderate chastisement because  
of mis conduct of Plf. as Drift's  
apprentice.

Repli. De injuria sua propria obque  
tali causa.

Held that under this replication  
Plf. could not introduce evi-  
dence of an immoderate chas-  
tisement. Itv has denied  
the cause & not the character  
of the beating.

Should have made new as-  
signment of immoderate  
chastisement.

Moderately not necessary in  
plea - plea good without it.

Hence de injuria did not put  
it in issue

Replication should have been  
a new assignment.





One of the facts stated by the defendant in his plea, and indeed the essential part of his excuse, was, that the chastisement was moderate; that fact he was bound to establish, and it was properly left to the jury to decide upon. [ALDERSON, B. The party states certain grounds on which he says he was authorized to inflict a moderate punishment; does the replication do more than deny the existence of those grounds?] A chastisement disproportionate to the offence is not excused by any cause. Lord Chief Baron Gilbert, in his "History of the Common Pleas,"<sup>1</sup> puts a case expressly in point:—"So, in an action of assault and battery, the defendant pleads that the plaintiff neglected his service, *per quod moderate castigavit*; the plaintiff replies *quod non moderate castigavit*, and the issue was found for the plaintiff; for, though this be an informal traverse, and bad on demurrer, being rather a traverse of the chastisement than of the moderate manner of doing it, and the right traverse should have been *de injuria sua propria absque tali causa*; yet after verdict it is good, because the jury have ascertained that he did beat him immoderately." [ALDERSON, B. No doubt *de injuria* puts in issue the whole cause; the question is, whether the moderate chastisement is part of the cause. Suppose the case of a plea of *son assault demesne*; do you mean to say that the replication *de injuria* would put in issue the allegation that the defendant *molliter manus imposuit*, and a little unavoidably, and so forth?] In a late case of *Reece v. Taylor*,<sup>2</sup> to a declaration for assault and false imprisonment, the defendant justified in defence of his possession, with an additional allegation that the plaintiff assaulted him in the presence of a police officer; and the Court held, on a replication *de injuria*, that the defendant was bound to prove the latter allegation; and Littledale, J., is reported to have said, that, under the plea of *son assault de mesne*, the defendant must show an assault by the plaintiff commensurate with the act complained of by him. So, in *Phillips v. Howgate*,<sup>3</sup> where the defendant justified an arrest under process of the Court, and alleged that the plaintiff, having conducted himself violently while in custody, he therefore struck him to prevent his escape, it was held, on the replication *de injuria*, that the defendant was bound to prove the violent conduct of the plaintiff. [ALDERSON, B. There the violent conduct alone could justify the striking of which the plaintiff complained, so that it went to form a material part of the excuse.] In *Cockcroft v. Smith*,<sup>4</sup> the court appears to have been of opinion that immoderate violence could not be justified under a plea of *son assault demesne*. The

<sup>1</sup> P. 154, referring to *Awbry v. James*, 1 Sid. 444; 1 Ventr. 70.

<sup>2</sup> 4 Nev. & Man. 469.

<sup>3</sup> 5 B. & Ald. 220.

<sup>4</sup> 11 Mod. 48.

cases cited on the other side are not conclusive against the plaintiff. In *Dale v. Wood*, and *Piggott v. Kemp*, the point under consideration was quite different. In *Lamb v. Burnett*, the only question was, whether the justification was made out in other respects, independently of the point now in dispute. [ALDERSON, B. Mr. Baron Bayley only left it to the jury in that case to consider the cause alleged by the defendant, and not the excessive violence; and Lord Lyndhurst appears to have thought the excess ought to have been replied. So far, therefore, that case is an authority.]

*Adams*, Serjt., and *G. Hayes*, in support of the rule, were stopped by the Court.

BOLLAND, B. The Court is of opinion that, on these pleadings, the plaintiff had no power to put in issue the moderateness of the chastisement inflicted by the defendant, but was bound to reply the excess. The case cited from Lord Chief Baron Gilbert would undoubtedly have been an authority for the plaintiff, if it had not been impeached by later decisions, which have laid it down that the excess must be replied. I may observe that, since the case of *Reece v. Taylor* was decided, my Brother Littledale has altered the opinion which he is reported to have expressed on that occasion, that the plea of *son assault demesne* required the defendant to prove the moderation of his conduct. The only question is, whether this replication does more than put in issue the cause alleged in the plea. What is that cause? The right which the defendant had, under the circumstances, to inflict a moderate chastisement on his apprentice. The plea says in effect, "I had a right to beat my apprentice because he misconducted himself." That is, on the face of it, a satisfactory answer to the plaintiff's complaint; and if he meant to admit that he had misconducted himself, but to charge the defendant with unwarrantable violence, he should have replied that he had not so misconducted himself as to warrant such a beating. I think, therefore, that the direction of the learned Judge was wrong, and that the rule must be made absolute for a new trial.

ALDERSON, B. The plaintiff complains of a battery; the defendant says it was the fruit of a moderate and suitable chastisement, and goes on to assign the cause for which he had a right to inflict it. That cause is, that the plaintiff, being his apprentice, behaved himself improperly and disobediently; and, being proved, it amounted to a good justification. The plaintiff, by his replication, denies that cause, and says the defendant acted, not for the cause he has assigned, but of his own wrong. He puts in issue the cause, not the character, of the chastisement — that is to say, whether or no he misconducted himself as an



Declaration by indorser against maker of promissory note.

Plea that note was given by Deft in expectation of receiving money thereon at a future day that the day has passed & he has received no money thereon but that the whole transaction was a fraud & that no value has ever been given for note & that yall this P. lly. had knowledge when note was indorsed to him.

Repli: - De Injuria.

Steld that replication is good. The action being assumpsit does not make it bad. It does not put in issue several defences though it does several facts.

apprentice. He had no right, therefore, to go beyond this issue, and raise a question before the jury as to the excess.

GURNEY, B., concurred.

*Rule absolute.*<sup>1</sup>

*omit.*

ISAAC v. FARRAR.

IN THE EXCHEQUER, HILARY TERM, 1836.

[Reported in 1 *Meeson & Welsby*, 65.]

ASSUMPSIT by the indorsee against the maker of a promissory note for £250, payable three months after date to the order of the maker, and by him indorsed to one Henry Richardson, who indorsed it to the plaintiff.

Plea, that before the making of the said promissory note, to wit, on &c., a certain advertisement had been and was inserted in a certain newspaper, to wit, the Morning Herald, to the tenor and effect following, viz.: "Money to lend upon personal security. — Noblemen, clergymen, and persons of responsibility, requiring the temporary advance of money, can be immediately accommodated with loans to any amount, at a very low rate of interest; application to be made in the first instance in writing, addressed to Mr. Anderson, Fludyer Street, Westminster." And the defendant averred, that in consequence of the advertisement he did, to wit, on &c., call at the said place, to wit, &c., and there saw one Charles Anderson, and that in consequence of the representations made to him by the said C. Anderson, he the defendant was induced to draw and deliver, and he did then draw and deliver, to the said Anderson, two promissory notes, whereby and by each of which the defendant promised to pay to his own order the sum of £250, three months after the date thereof, (one of them being the said note in the said first count mentioned,) upon the faith of and promise from the said Charles Anderson, that the said notes should be renewed, when due, for the space of two years, and that he should receive from the said Charles Anderson, on a certain day, to wit, the Friday then next following, being, to wit, the first day of May, 1835, the amount of the said notes, deducting discount and stamp. And the defendant further saith, that the said Charles

<sup>1</sup> *Oakes v. Wood*, 8 M. & W. 150; *Lambert v. Hodgson*, 1 Bing. 317; *Lamb v. Burnett*, 1 C. & J. 291; *Bowen v. Parry*, 1 C. & P. 394; *Dale v. Work*, 7 B Moore, 33; *Oystead v. Shed*, 12 Mass. 506; *Great Falls Co. v. Wooster*, 15 N. H. 412, *Tomlinson v. Darnall*, 2 Head, 538, *accord*; *Ayres v. Kelly*, 11 Ill. 17; *Fisher v. Bridge*, 4 Blackf. 518; *Hannen v. Edes*, 15 Mass. 347; *Loring v. Aborn*, 4 Cush. 608; *Curtis v. Carson*, 2 N. H. 539; *Bennett v. Appleton*, 25 Wend. 371; *Elliot v. Kilburn*, 2 Vt. 470; *Mellen v. Thompson*, 32 Vt. 407, *contra*. See *Dean v. Taylor*, 11 Ex. 68. — Ed.

→ Anderson did not nor would, either on Friday the said first day of May, 1835, or at any other time, (although often requested so to do,) pay to the said defendant the amount of the said notes, deducting as aforesaid, or any sum of money whatever; but on the contrary thereof, the defendant saith, that he the said defendant, to wit, on the said first day of May, 1835, by appointment of the said Charles Anderson, went to the said place, to wit, 12 Fludyer Street, but the said Charles Anderson was not, nor was any such person, either then or at any time afterwards, there to be found, and that the said transaction was a gross fraud and imposition upon him the defendant, and that the note was indorsed to the plaintiff without consideration, and that he holds the same without value or consideration, and that there never was and is not any consideration or value on the said note between any parties thereto; and he further saith, that the said Henry Richardson, and the said plaintiff, and each of them, at the several and respective times when the said note in the said first count mentioned was so indorsed and delivered to them respectively, as in the said first count mentioned, was privy to and had full knowledge and notice of the said transaction in this plea detailed, and of the said fraud and imposition: and this the defendant is ready to verify. ← -

→ Replication. That the defendant of his own wrong, and without the cause by him in that plea alleged, broke his said promise in the said first count mentioned, in manner and form as the said plaintiff hath in the said first count of the said declaration in that behalf complained against him, &c.

Special demurrer, assigning for causes — First, that the replication *de injuria* is a bad plea to the defendant's plea in assumpsit. Secondly, that the replication is bad for duplicity, because it is too large, and puts in issue all the several facts alleged by the plea, instead of putting in issue the point to be tried between the parties. Thirdly, that the facts of the fraud and notice to the plaintiff, and the want of consideration for the note in the plaintiff's hands, alleged by the plea, are distinct and separable facts, on either of which the plaintiff might and ought to have tendered an issue, and he cannot by his replication put both in issue; and the replication, because it puts both such facts in issue, is bad.

The case was argued in the present term, by *Hoggins*, in support of the demurrer; and by *Humfrey*, contra, in support of the replication.

The court took time to consider, and the judgment of the court was now delivered by

LORD ABINGER, C. B. On this demurrer to the replication, two objections were made: First, that its form was improper, as the induce-

Before Hilary Rule now assumption put most anything in issue. Consequently rarely any occasion for any replication at all in assumption. But after N. R. affirmative plea & cause necessary & hence desire to use a broad replication.

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Plea here double

1. Note obtained by fraud.
2. Note obtained with out any consideration.

Stence plea bad.

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When indorsee sends it is necessary to show that he was in as bad a position as payee, that is that he was in the wrong, & hence right not to recover.

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Plea sets up that Plea.

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1. Paid nothing for note
2. Knew of fraud.

Replication Cures duplicity  
in plea & is not open itself  
to duplicity as it is as  
least as good as the plea.

De injuria applies only to excuse.

Fraud hardly a plea in  
Excuse but an Equitable  
defense.

Old remedy of Deft. would  
have been an injunction  
from Equity requiring Pltff.  
from bringing this action.

ment of *de injuria*, &c., was inapplicable to an action of assumpsit; and, secondly, that it was bad because it was multifarious, and put in issue several distinct facts, each of which would, if disproved, be decisive of the action.

We think the replication is good, notwithstanding these objections.

This form, though most commonly used in actions of trespass, or trespass on the case for an injury, is not inappropriate to an action of trespass on the case for a breach of promise, where the plea admits a breach, and contains only matter of excuse for having committed that breach. The defendant's breach of promise may be considered as a wrong done, and the matter included under the general traverse *absque tali causa*, and thereby denied, as matter of excuse alleged for the breach.<sup>1</sup> — Per Lord Ellenborough, *Barnes v. Hunt*.<sup>2</sup>

No case in which this form of replication has been held to be improper, resembles the present. In *Crisp v. Griffiths*,<sup>3</sup> the plea was not matter of excuse for the breach of contract, but of subsequent satisfaction for that breach. In *Solly v. Neish*,<sup>4</sup> the plea was a denial of the promise. So, in *Whittaker v. Mason*,<sup>5</sup> the plea denied the contract as alleged; and although the Court intimated that it might be doubtful whether a traverse in this form was applicable to any action on promises, they abstained from deciding that question. On the other hand, in the case of *Noel v. Rich*,<sup>6</sup> this Court expressed a strong opinion that this general form of traverse, in a case similar to the present, was proper: and we think that it is; for the plea confesses that the defendant made the note in question and indorsed it to Richardson, who indorsed it to the plaintiff, which constitutes a *prima facie* case of liability, and an implied promise to pay the amount to the plaintiff; and it avoids the effect of that admission by showing that the note was made and indorsed without value *bona fide* paid, whereby the defendant was excused from performing that promise.

As to the objection that the replication is multifarious, the facts contained in the plea, though they are several, constitute one ground of defence; and the rule of pleading is not that the issue must be joined on a single fact, but on a single point of defence. This was laid down by Lord Mansfield in *Robinson v. Raley*, by the Court of King's Bench in *O'Brien v. Saxon*, and by Mr. Justice Bayley in the case of *Carr v. Hinchcliffe*.<sup>7</sup> In each of these cases, the facts there allowed to be included in one issue, as amounting to a single ground of defence, were several. In the first, the facts that the cattle were commonable,

*Bad in pleading Robinson v. Raley.*

<sup>1</sup> See *Coffin v. Bassett*, 2 Pick, 357, *contra*. — Ed.

<sup>2</sup> 2 C. Mee. & Ros. 159.

<sup>3</sup> 2 Bligh, New C. 359; s. o. 2 Scott.

<sup>4</sup> 7 D. & R. 42; 4 B & C. 547

<sup>5</sup> 11 East, 455.

<sup>6</sup> 2 C. Mee. & Ros. 355.

<sup>7</sup> 2 C. Mee. & Ros. 360.

and levant and couchant, constituted one proposition, viz., that the cattle were entitled to common; in the second, the trading, petitioning creditor's debt, and act of bankruptcy, formed one point of defence, viz., the bankruptcy of the plaintiff; and in the last, the facts of the goods, for the price of which the action was brought, being sold by an agent as principal, and a set-off of a debt due from the agent, constituted the defence of payment, or satisfaction of the plaintiff's demand.

So, in the present case, the plea contains in substance one ground of defence only, that is, that the plaintiff was not the *bona fide* holder for value, although several facts are necessarily averred as constituting parts of it. Every indorsee of a bill has his own title, and that of each intermediate party; and if he or any of such parties gave value for the bill without fraud, he is a holder for value. The plea in this case alleges in effect that the defendant had no value for making the note, and that neither the first indorsee, nor the second, received the bill *bona fide*, which is only a statement, necessary in point of law, of the several facts constituting the defence, that the plaintiff is not a *bona fide* holder for value.

If this replication were not allowed, some inconvenience would follow, for in every action on a bill or note it would be competent for a defendant, by alleging fraud, or such other circumstance as would throw the proof of value on the indorsee, to compel him to prove it. For it would seldom happen that a plaintiff, if he were tied down to dispute one fact, could take issue on such an allegation; and then he would be obliged to take an issue which would admit the fraud, and throw the proof of value on himself, thereby placing him in a worse situation than before the late rules. On the other hand, if this replication be allowed, the indorsee is left in the same situation as he was before, with the additional advantage that he is made acquainted with the defence intended to be set up, which was one grand object of the pleading regulations; and he will be called upon to prove value given or not, accordingly as the defendant shall prove or fail in the proof of the allegation of fraud, as he would before under the general issue.

We do not, however, decide this case on the ground of convenience, but in conformity with the established rules of pleading; and we are of opinion that the demurrer must be overruled.

*Judgment for the plaintiff.*<sup>1</sup>

<sup>1</sup> Noel v. Rich, 2 C. M. & R. 360; Curtis v. Headfort, 6 Dowl. 496; Humphreys v. O'Connell, 7 M. & W. 870; Watson v. Wilks, 5 A. & E. 237; Griffin v. Yates, 2 B. N. C. 579; Scott v. Chappelow, 4 M. & G. 336; Basan & Arnold, 6 M. & W. 559; Hemingway v. Hamilton, 4 M. & W. 115 (*semble*); Whitehead v. Walker, 9 M. & W. 506; Mitchell v. Cragg, 10 M. & W. 367; Cowper v. Garbett, 18 M. & W. 33. — R.

Before rule deft. Would plead non-  
assumpsit & then under that  
show fraud & then plif. Could  
rebut that by showing that he took  
note bona fide & for value.

Declaration by maker against ac-  
ceptor of bill of Exchange.

Plea that Deft. wrote his name  
on paper in form of acceptance  
with understanding that Plff.  
should make out a bill at 2mos  
that instead he made it out at  
1mo's time.

Replication:- De injuria.

Hold that replica is bad since  
the plea is not in excuse  
but denies the making of  
the promise.

Deft. might have pleaded that  
he did not accept the bill al-  
leged.

Can show that you cannot  
plead a traverse, de injuria  
or any other, to a traverse  
& that though the plea seems  
to be affirmative yet if it is  
in effect a traverse another  
traverse in replication is bad

## FISHER v. WOOD.

IN THE EXCHEQUER, TRINITY TERM, 1841.

[Reported in 1 Dowling, New Series, 54.]

**ASSUMPSIT** by drawer against acceptor of a bill of exchange, payable one month after date. The declaration was in the usual form.

Plea, that, before the time of making of the bill, the defendant wrote his name across the paper whereon the same is written, in the form of an acceptance of a bill of exchange, and then consented that the plaintiff should draw thereon a bill of exchange, directed to the defendant, requiring him to pay the sum of, &c., at two months after the date thereof; yet the plaintiff, in violation of the said agreement, made the said bill of exchange payable one month after the date thereof.

Replication *de injuria*.

Special demurrer, assigning for cause that the plea is in denial of the promise, and not in excuse.

*Whitehurst*, in support of the demurrer. It is clearly established, that the replication *de injuria* is only applicable where the plea discloses matter in excuse of the breach of promise, or duty alleged. Here, the plea is in denial of the contract stated in the declaration. *Cleworth v. Pickford*<sup>1</sup> and *Elwell v. The Grand Junction Railway Company*<sup>2</sup> are authorities in point.

**PARKE, B.** The plea is an argumentative denial that the defendant accepted the bill, payable at two months after date. It ought to have concluded with a special traverse.

The court called upon

*Gray*, in support of the replication. The replication *de injuria* is, in some cases, allowable, even though the plea amounts to a denial of the contract alleged in the declaration. In *Basan v. Arnold*,<sup>3</sup> which was an action by indorsee against acceptor of a bill of exchange, the defendant pleaded that he accepted the bill for the accommodation of B., who indorsed, and delivered it to the plaintiff, upon an agreement to discount the same, and pay the value to him, which the plaintiff neglected to do, and it was held, that *de injuria* was a good replication.

**PARKE, B.** That plea disclosed matter which excused the payment. Here, the plea is a denial of the contract. It is like the case of a man

<sup>1</sup> 7 M. & W. 814.

<sup>2</sup> 5 M. & W. 689.

<sup>3</sup> 6 M. & W. 559.

giving an authority to his agent to accept one kind of bill, who, instead of doing so, accepts another. You had better amend.

Gray elected to amend.<sup>1</sup>

*Quint.*

SALTER v. PURCHELL.

IN THE EXCHEQUER CHAMBER, NOVEMBER 29, 1841.

[Reported in 11 Law Journal Reports, Exchequer Chamber, 482.<sup>2</sup>]

DEBT for goods sold and delivered.

Plea, that the plaintiff sold the goods through the medium of one G. M., who was the plaintiff's factor, and intrusted by him with the goods, as G. M.'s own goods, by the plaintiff's consent; and that the defendant had no means of knowing that the plaintiff was the owner of the goods. The plea then stated a set-off of a debt due from G. M. to the defendant.

Replication: That the defendant, of his own wrong, and without the cause by him alleged, neglected to pay the sum due.

*Martin*, for the plaintiff in error (the defendant below). The plaintiff in error will contend, first, that the replication *de injuria* is inadmissible in actions of debt; secondly, that it cannot be allowed in the present case, where the plea does not amount to matter of excuse, but states an authority from the plaintiff. As to the first point, he cited *Selby v. Bardons*, *Crogate's case*, Com. Dig. "Pleader," (F) 18 to (F) 24, *Craft v. Boite*,<sup>3</sup> *White v. Stubbs*,<sup>4</sup> *Jones v. Kitchin*, *Richards v. Murdock*,<sup>5</sup> *Robinson v. Rayley*, *Isaac v. Farrar*, *O'Brien v. Saxon*, *Carr v. Hinchliff*,<sup>6</sup> *Griffin v. Yates*,<sup>7</sup> *Watson v. Wilks*,<sup>8</sup> *Brancker v. Molyneux*.<sup>9</sup> Secondly, the replication *de injuria* is admissible only where the plea constitutes an excuse. In this case, the plea does not amount to an excuse, for it is pleaded to an *indebitatus* count, which can be sustained only where there is a complete debt; and where a complete debt exists, there can be no excuse for not paying it. The plea amounts to a denial that the defendant was indebted to the plaintiff at the time of action brought. That being so, the replication *de injuria* is bad;

<sup>1</sup> *Whittaker v. Mason*, 2 B. N. C. 359; *Elwell v. Gr. J. R. R.*, 5 M. & W. 669; *Cleworth v. Pickford*, 7 M. & W. 314; *Schild v. Kilpin*, 8 M. & W. 673; *Pelly v. Rose*, 12 M. & W. 485; *Parker v. Riley*, 3 M. & W. 280; *Solly v. Neish*, 2 C. M. & R. 355, *accord*; *Henden v. Ruel*, 6 Scott, 442 (*semble*); *Allen v. Crofoot*, 7 Cow. 46, *contra*. — ED.

<sup>2</sup> S. c., 1 Q. B. 197. — ED.

<sup>3</sup> 2 Ibid. 295.

<sup>4</sup> 4 B. & C. 547.

<sup>5</sup> 5 Ad. & El. 287.

<sup>6</sup> 1 Wms. Saund. 244, c. n. 1.

<sup>7</sup> 10 B. & C. 527.

<sup>8</sup> 2 Bing. N. C. 579.

<sup>9</sup> 1 Man. & Gr. 720.

Debt for goods sold & delivered.

Plea that goods were sold Deft by me G. M. who was Pltf's factor & who was intrusted with goods as his own & who that Deft. had no means of knowing they were not G. M.'s, and a set off of a debt due Deft. from G. M.

Replication De Injuria.

Held that the replication is bad. 1st, ~~It puts in issue~~ It is pleaded to a plea in bar & not to a plea in excuse. 2nd. The facts it attempts to put in issue are as much in Pltf's knowledge as Deft's & hence should be specially traversed.



Grounds of Decision

1. Put in issue authority of Pltff.
2. ~~Pltff~~ Is pleaded to a plea in bar  
not in excuse.
3. At this time de injuria not  
allowed in debt but now later.

13 M. & W. 33

first two grounds good.

*Elwell v. The Grand Junction Railway Company*.<sup>1</sup> An excuse must exist at the time when a right of action accrues, but matters in discharge arise subsequently; therefore, as a set-off may arise at a later period than the cause of action, it is a matter in discharge rather than in excuse. *Whittaker v. Mason* <sup>2</sup> shows, that where a plea in assumpsit amounts not to an excuse, but to a denial of the contract, the replication *de injuria* is improper. In *Carr v. Hinchliff*,<sup>3</sup> a plea exactly similar to the present was held to be an extinguishment of the plaintiff's demand. In *Cleworth v. Pickford*,<sup>4</sup> *de injuria* was held to be a bad replication to a plea, which amounted either to the general issue or to a set-off. He also cited *Dendy v. Powell*,<sup>5</sup> *Goodchild v. Pledge*, *Ashbee v. Pidduck*.<sup>6</sup> Again, the plea falls within the third resolution in *Crogate's* case, as it states an authority from the plaintiff to the factor to sell the goods.

*Peacock*, contra, as to the first point, cited *Isaac v. Farrar*, *Noel v. Rich*,<sup>7</sup> *Ensall v. Smith*,<sup>8</sup> *Barnes v. Hunt*,<sup>9</sup> *Richards v. Murdock*, *Hebden v. Ruel*.<sup>10</sup> Secondly, the plea states matter of excuse, and not in discharge of the action. The validity of this defence was established by the case of *George v. Clagett*.<sup>11</sup> The defendant was not bound to plead his set-off, but when he does take that course, he admits the debt, and excuses the non-payment of it. The court must have considered that the plea in *Carr v. Hinchliff* amounted not to a discharge, but to an excuse, otherwise it would hardly have been held to be a confession and avoidance by matter *ex post facto*. The fact that an action may be brought in respect of the set-off, although it has been pleaded, shows that the debt has not been extinguished. The authority alluded to in *Crogate's* case is an authority given to the defendant.

*Martin*, in reply.

The judgment of the court was delivered by

TINDAL, C. J. [After stating the pleadings and judgment below, his Lordship proceeded as follows:] A writ of error having been brought by the defendant below on this judgment, two principal objections have been urged in argument before us, viz., first, that this general form of traverse of the plea is wholly inadmissible to an action of debt on the *indebitatus* counts; and, secondly, that it is not applicable to the plea of the defendant, which is virtually and substantially a plea of set-off; and, as we are all of opinion that the judgment of

<sup>1</sup> 5 Mee. & Wels. 669.

<sup>2</sup> 4 Bing. N. C. 803.

<sup>3</sup> *Crisp v. Griffiths*, 2 C. M. & B. 159 (*semble*); *Edwards v. Greenwood*, 5 B. N. C. 476 (*semble*); *Jones v. Senior*, 4 M. & W. 128; *Catterall v. Lees*, 8 C. B. 113, *accord*. — Ed.

<sup>4</sup> 7 Mee. & Wels. 814.

<sup>5</sup> 3 Ibid. 442.

<sup>6</sup> Ibid. 564.

<sup>7</sup> 2 Cr. M. & R. 360.

<sup>8</sup> 1 Ibid. 522.

<sup>9</sup> 11 East, 451.

<sup>10</sup> 6 Sco. 442.

<sup>11</sup> 7 Term Rep. 869.

the court below cannot be supported upon the second ground of objection, we hold it unnecessary to intimate any opinion upon the first.<sup>1</sup> The question is, whether the well-known rule in Crogate's case applies to the state of pleadings on this record. That rule, by which the plaintiff has been permitted to use this general form of replication instead of being compelled to take issue on some material fact stated in the defendant's plea, has always been limited, in its terms and in its application, to cases of actions brought for personal injuries, where the facts stated in the plea amount merely to matter of excuse or justification of the act complained of; as where in trespass for assault and battery there is a plea of *son assault demesne*, or a plea of *molliter manus imposuit*, in defence of possession; or, in false imprisonment, where there is a plea that the plaintiff broke the peace, and that he, the defendant, being a constable, and present, took him in order to carry him to a justice of the peace; or in an action on the case for defamation, where the plea justifies by reason of the truth of the words spoken; in all which, and similar instances, the facts stated in the plea show that at the time the act complained of was done, it was done under circumstances which make it excusable or justifiable in the eye of the law. And it is to such pleas only that the rule in Crogate's case applies. But there is a manifest distinction between such pleas and those which rely upon matter of discharge and extinguishment of the right of action; as to which latter class, no authority has been cited to show that the general form of traverse is allowable; and, indeed, it is excluded by the very terms of the rule above referred to. Thus, in a plea of payment, or accord and satisfaction, or release, or of any matter which extinguishes the right to sue, both the rules of pleading, and the course and practice from the earliest time, require the plaintiff to make a traverse of, or to deny the material fact stated in the plea which constitutes the discharge or extinguishment of the right of action. In the present case, the plea is, in substance, a plea of set-off. Such a plea operates as a bar to the plaintiff's right of action, not by excusing or justifying the breach of promise complained of in the declaration, but, whilst it admits such breach to have been committed, by setting up, as a matter of compensation, the cross-demand of the defendant by force of the statutes of George the Second;<sup>2</sup> and it is unnecessary to observe, that an ordinary plea of set-off cannot be met by the general traverse, but only by a special traverse or denial of the existence of the cross-demand; and, upon another and distinct ground, the replication upon this record is inapplicable to the present case; for

<sup>1</sup> In *Cowper v. Garbett*, 13 M. & W. 33, the replication *de injuria* was held admissible in an action of debt. — Ed.

<sup>2</sup> 2 Geo. II. c. 22, § 18; 8 Geo. II. c. 24, §§ 4, 5.



Assumpsit.

Declaration that Defts had engaged Plaintiff for a year & wrongfully discharged him.

Plea misconduct for which they discharged him.

Repli. de injuria.

Evidence was admitted that Defts did not know of misconduct at time of discharging Plt. & Jury found verdict for Plt.

On appeal held that the Evidence is inadmissible, as the intention cannot be put in issue by de injuria. There Plt. tries to show D's motive or intention.

in those instances in which the plea goes only to matter of excuse or justification, and when, consequently, the general traverse is allowed, there is engrafted an exception, that, where the plea justifies under any authority, or command, or license from the plaintiff, the general replication is not good without a special traverse of such command, license, or authority; <sup>1</sup> and the exception to the rule, so far from being arbitrary, appears to be founded in good sense; for, although the plaintiff may be well allowed by his general replication to put in issue, and to compel the defendant to prove, all the facts which constitute his defence, when they lie in his, the defendant's, exclusive knowledge, yet where facts are pleaded which lie equally in the knowledge of the plaintiff and the defendant, such as an authority or license given by the plaintiff, there is no reason for compelling the defendant to prove them, unless the plaintiff thinks proper to deny them by a special traverse; and the same reason will explain a similar exception from the general rule, where the defendant claims in his plea any interest in or out of land, for such interest must have been granted originally either by the plaintiff himself, or those to whom he is privy in estate. Now, in the present case, the plea alleges that Mason, against whom the right of set-off is claimed, was the factor and agent of the plaintiff; and that Mason, with the consent of the plaintiff, sold and delivered the goods in question to the defendant, in his own name, and as his own goods. But the agency of Mason, and the consent of the plaintiff that he should sell the goods as his own, and in his own name, are facts that lie as much in the conscience of the plaintiff as of the defendant, and stand upon the same footing as the authority or license of the plaintiff, which form acknowledged exceptions from the general rule. As well, therefore, upon this latter, as upon the former more general ground, we think the replication inadmissible in this case, and that the judgment of the court below must be reversed.

*Judgment reversed*

*omit.*

SPOTSWOOD v. BARROW AND ANOTHER.

IN THE EXCHEQUER, FEBRUARY 12, 1850.

[Reported in 5 Exchequer Reports, 110.]

ASSUMPSIT for the wrongful discharge of the plaintiff from the service of the defendants, as a traveller and salesman, before the expiration of the period of his engagement.

<sup>1</sup> Y. B. 16 Hen. VII. f. 2, pl. 7; Solly v. Nelsh, 2 C. M. & R. 855; Bowler v. Nicholson, 12 A. & E. 841, accord. See Barnes v. Hunt, 11 East, 451. — ED.

Plea. That whilst the plaintiff continued in such employ, to wit, on &c., and on divers other days and times, &c., he misbehaved and misconducted himself in this, to wit, that he wilfully, wrongfully, and improperly refused to obey the just, lawful, and reasonable commands of the defendants, with reference to the plaintiff's conduct and proceedings in the said employ, and the business thereof; and that the plaintiff, during the time aforesaid, received from divers customers of the defendants divers moneys of and for the defendants, and did not nor would account for or remit the said moneys to the defendants within reasonable times in that behalf, but then neglected and refused so to do, and improperly and wrongfully, and contrary to the express and lawful and reasonable commands of the defendants in this behalf, kept and detained the said moneys from the defendants for long and unreasonable spaces of time, without any just cause or excuse in that behalf; and also wrongfully and unjustly appropriated a part of the said moneys to his own use, without the consent and against the will of the defendants. Wherefore the defendants afterwards, to wit, at the said time in the declaration in that behalf mentioned, did, by reason of the said premises in this plea aforesaid, refuse to continue the plaintiff in their said employ, or to suffer or permit the plaintiff to travel or act as a salesman of and for the defendants, or in any other manner in their said employ, as by the plaintiff in the said declaration in that behalf alleged; and the defendants then therefore discharged the plaintiff from their employ, as they, the defendants, lawfully might, for the cause aforesaid. Verification.

Replication, *de injuria*.

At the trial, before Wightman, J., at the Liverpool Summer Assizes, 1849, it appeared that, in March, 1846, the defendants agreed to employ the plaintiff as a traveller and salesman for one year, at a salary of £200. The plaintiff accordingly entered the defendants' service in that capacity, and continued therein until August, 1846, when the defendants discharged him. On the part of the defendants it was proved that the plaintiff had wrongfully appropriated certain moneys which he had received for the defendants' use; but it appeared, on cross-examination, that the fact of the misappropriation did not come to the defendants' knowledge until after they had discharged the plaintiff. The learned judge asked the jury whether the misconduct proved was the cause of the dismissal; and the jury having replied in the negative, a verdict was found for the plaintiff for £80.

*Wilkins*, Serjt., in the following term obtained a rule *nisi* for a new trial, on the ground of misdirection; against which

*Knowles* now showed cause. A master cannot justify the discharge of a servant on account of misconduct unknown to him at the time of

As a matter of substantive law  
although he does not know of  
misconduct at time of dis-  
charge & does not find it  
out 'till later, yet it is a  
good defense for discharg-  
ing servant.

The ~~cause~~<sup>motivation</sup> for discharge isn't  
material & hence not de-  
nied by de injuria

L.R. 2 Ex. 230.





dismissal. The law is thus stated in *Cussons v. Skinner*:<sup>1</sup> "Where there has been disobedience or an act of misconduct by a servant, known to the master at the time he discharges him, although the master does not mention that as the precise ground of discharge, he may afterwards, by showing that the fact existed, and that he knew it, justify such discharge; but, *semble*, that it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of it." This case is distinguishable from *Ridgway v. The Hungerford Market Company*,<sup>2</sup> for there the question was not raised by the pleadings. Here the effect of the replication *de injuria* is to put in issue the *virtute cujus*, and consequently the direction of the learned judge was right. In *Lucas v. Nockells*,<sup>3</sup> Bayley, J., says, "Where a *virtute cujus* is a mere inference of law drawn from premises previously stated, I agree it cannot be traversed; but where it is not a legal result, but a pure question of fact, I believe all the authorities are that it may be traversed." Here the *virtute cujus* involves matter of fact, namely, the motive and knowledge of the defendants. [PARKE, B. *Oakes v. Wood*<sup>4</sup> decided, that the motive and intention with which an authority given by law is exercised cannot be inquired into under the general replication *de injuria*. If this plea had alleged that the defendants had notice of the plaintiff's misconduct, wherefore they discharged him, your argument might apply. ALDERSON, B. It is clearly settled since that case, that the motive is not in issue.]

*Wilkins*, Serjt., and *Atherton* appeared to support the rule, but were not called upon.

PARKE, B. The replication only involved the fact of misconduct; therefore the learned judge was wrong in leaving to the jury what the motive of the defendants was. *Oakes v. Wood* decided that the defendant's motive or intention is immaterial, if the law justifies him in doing what he has done.

ALDERSON, B. All that is in issue is, whether the defendants had a justifiable cause for doing the act complained of.

ROLF, B. The subject may be illustrated by what was said in *Doe d. Daniell v. Woodruffe*,<sup>5</sup> viz.: "Where a party having a right of entry, enters, it is not competent for him to repudiate any rights he may possess, and to say he has entered as a trespasser, or by some other than his real title. As soon as he has entered he is possessed, whether he will or no, by virtue of every title which he had in him, and which he could assert by entry." Littleton, § 695, is there referred to;

<sup>1</sup> 11 M. & W. 161.

<sup>2</sup> 3 A. & E. 171.

<sup>3</sup> 10 Bing. 193.

<sup>4</sup> 2 M. & W. 791.

<sup>5</sup> 10 M. & W. 608.

and that old authority seems to me to be founded on very good sense.

PLATT, B., concurred.

*Rule absolute.*<sup>1</sup>

<sup>1</sup> *Oakes v. Wood*, 2 M. & W. 791; *Price v. Peek*, 1 B. N. C. 387; *Woods v. Durrant*, 16 M. & W. 149, *accord.* Conf. *Lucas v. Nockells*, 10 Bing. 157; *Carnaby v. Welby*, 8 A. & E. 878. — ED.

1.  
1).  
1).  
1).  
1).

—

Duplicity might occur in any pleading except perhaps in Declaration. Then by several counts you can set forth several causes of action. If several causes in one count certainly not artistic & some cases hold it bad. D. is only a fault in form. Pleading really too good, set up too much.

and also make perfect.  
All P'ty. need set up is bond, since condition is subsequent, & breach in non payment. Def't sets up condition to the bond. <sup>condition then pleads</sup>

Might it not be said that making award includes delivery - W. thinks yes, Case shows how exact old pleader was.

Detinue.

Plea that after bailment P'ty. married Lord Audley, & he as her husband relinquished all claim. Held good. There is no duplicity because the statement of marriage is necessary to make the release of any avail.

All chattel property vests in husband at common law. It runs out marriage it is not her goods but his that are detained.

Plea here 1. Denies P'ty's title & goods here. equal to now possessed. 2 Denies

7  
 Bac. Ab. Pl. N. 6.  
 1 Port (Comm.) 387.  
 " " 146.  
 2 " 336.  
 6 Mass. (2d) 291.  
 1 Blackf. 164. #694.  
 Chetty 164.

## CHAPTER IV.

## DUPLICITY.

12 cases.

## ANONYMOUS.

IN THE MICHAELMAS TERM, 1489.

[Reported in Brooke's Abridgment, Double Plea, placitum 90.]

"DEBT upon bond, which was on condition to abide by the award of J. N., so that the same was made and delivered to the parties by such a day; the defendant says that no award was made or delivered before that day; and it is double, *per totam curiam*, for it is a good plea that he made not any award by the day, and it is a good plea that he delivered not the award before the day, *et idem, quod non deliberavit arbitrium in scriptura, &c.*, where the submission is — to be (that the award should be) delivered in writing."<sup>1</sup>

Order.  
 185 (1st).  
 185 (2nd).  
 186 (1st).  
 187 (1st).  
 187 (2nd).  
 188  
 192  
 194  
 197

## DAME AUDLEY'S CASE.

IN THE QUEEN'S BENCH, EASTER TERM, 1561.

[Reported in Moore, 25.]

DETINUE. The defendant says that after the bailment to him by the plaintiff she married Lord Audley, who during the marriage released him of all actions. *Nichols*. The plea seems double, for he has pleaded two matters in bar: first, property in the husband by the

<sup>1</sup> Combe v. Talbor, 1 Salk. 218; Faulkner v. Chevell, 5 A. & E. 218; Smith v. Dixon, 7 A. & E. 1; Deacon v. Stodhart, 5 B. N. C. 594; Williams v. Jones, 1 G. & D. 649; Rawlinson v. Shand, 5 M. & W. 468; Butcher v. Stuart, 9 M. & W. 196; Burrass v. Hewett, 4 Ill. 224; Scott v. Whipple, 6 Me. 425; Bean v. Farnam, 6 Pick. 269; Nichols v. Arnold, 8 Pick. 172; Welch v. Jamison, 2 Miss. 160; Kennedy v. Strong, 10 Johns. 289; Connelly v. Pierce, 7 Wend. 129; Tubbs v. Caswell, 8 Wend. 129; Camp v. Morse, 5 Den. 161; Rumbarger v. Stiver, 6 Ohio, 99, accord. — Ed

none in  
 library.

marriage; second, release by the husband. And it was held by all the judges that the plea was not double, since he could not plead the release without pleading that it was after the marriage, otherwise it was not material, wherefore, &c.<sup>1</sup>

### SAUNDERS v. CRAWLEY.

IN THE KING'S BENCH, MICHAELMAS TERM, 1614.

[Reported in 1 Rolle, 112.]

SAUNDERS brought debt on an obligation for non-performance of articles which were to pay so much at two fixed days in equal portions, which the defendant says he paid accordingly. The plaintiff replies that he has not paid accordingly, which is double plea, *quod fuit concessum per curiam*,<sup>2</sup> for this goes to both days.<sup>3</sup>

*Plaf. should have replied that he did not pay on one particular day naming it for that would give a cause of action. Plea quod receam. Deft. must show he performed all.* GAILE v. BETTS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1676.

[Reported in 3 Salkeld, 142.]

*omit.*  
DEBT upon bond, the defendant craved *oyer* of the condition, which was to pay £40 so long as the defendant should enjoy such an office, by quarterly payments every year; then he pleads that the office was granted to three for their lives, and that he enjoyed it as long as they lived, and so long he paid the said rent quarterly. The plaintiff replied that he (the defendant) enjoyed the office longer, and that he had not paid the money by quarterly payments; and upon demurrer to the replication, it was objected that it was double. *Sed per curiam*, it is not, for the defendant cannot in his rejoinder tender an issue upon payment of the money, because that would be a departure from his plea.

<sup>1</sup> *Calf v. Nevil*, Poph. 186; *Rowles v. Lusty*, 4 Bing. 428; *Currie v. Henry*, 2 Johns. 433; *Lord v. Tyler*, 14 Pick. 156, 165; *State v. Bank*, 83 Miss. 474, 496, *accord.* — ED.

<sup>2</sup> *Humphreys v. Churchman*, C. T. Hard. 289; *Jernegan v. Harrison*, 1 Stra. 317; *Griffiths v. Eyles*, 1 B. & P. 418; *Cheasley v. Barnes*, 10 East, 78; *Brooks v. Stuart*, 9 A. & E. 864; *Hulme v. Muggleston*, 8 M. & W. 80; *Austin v. Parker*, 18 Pick. 222; *Mooney v. Demerit*, 1 N. H. 187, *accord.* — ED.

<sup>3</sup> The remainder of the case was to the effect that duplicity was no objection on general demurrer. — ED.

nor no detains and Audley's goods.

If action had arisen so as to become a chose in action husband would not get that but he would be entitled to reduced chose in action to possession by a sort of power of attorney. Thus by power of Atty. he released the chose in action.

~~If action arose before marriage pleading if not till after marriage then pleading not good. Why?~~

Debt on a bond for payment of quarterly payments as long as Deft. holds a certain office. Plea that he held it a certain time only & made payment during that time.

Repli. that he held it longer & did not make payments for longer time.

Demurrer.

Hold - Replication good for Deft. Cannot plead to payment for longer time but can deny only that he held it longer since to so plead would be a departure from his plea

2nd part of repli - in mater.



in 4th  
Case holds that duplicity is  
debarment is cured by  
answering one Plea must be  
taken advantage of or genl  
demures.

Pr  
to  
C.  
S.  
All right to state several claims  
but not right state several causes  
for same claim. But since  
time & place in pleading are  
immaterial you can state sev-  
eral causes for claim by vary-  
ing time & place.

Plea too small. Dec. would  
have been bad, for Dupl. in Sp.  
Dem.

Indebitatus assumpsit.

Comit for nonissuing me Longfield  
for which Deft promised to pay  
a certain sum & in same  
Comit a quantum meruit.  
On demurer held bad for  
duplicity.

Case right. Exception probably  
shows that was a special demurer  
~~otherwise~~ for genl demurer would  
not reach mere form.

## HUMPHREYS v. BETHILY.

IN THE COMMON PLEAS, TRINITY TERM, 1690.

[Reported in 2 Ventris, 198, 222.]

In an action of debt upon a penal bill, where the defendant was to pay 10s. on the 11th of June, and 10s. more upon the 10th of July next following, and 10s. every three weeks after, till a certain sum were satisfied by such several payments. And for the true payment thereof the defendant obliged himself in the penal sum of £7.

The plaintiff in factō dicit pleaded, that the defendant did not pay the said sum, or any part thereof, upon the several days aforesaid, unde actio accrevit for the £7.

The defendant pleaded that he paid 10s. upon the 11th of June, et hoc paratus est verificare, &c.

The plaintiff replied that he did not pay it, et hoc petit quod inquiretur per patriam. To which the defendant demurred.

The plea was held altogether insufficient.

But then POLLEXFEN, C. J., observed that the declaration was naught; for he should have declared that the defendant failed in payment of one of the sums, which would have been enough to have entitled him to the penalty; but he says, the said several sums of money, or any of them, and this is double; and he inclined that it was not aided by answering over, or by the general demurrer. Adjournatur.

*Vide Saunders and Crowley.*

The court now delivered their opinions that the doubleness in the declaration was cured by answering, and no exception can be taken to it upon the general demurrer. Saunders and Crowley is the same with this.

*Judicium pro quer'.<sup>1</sup>*

## HART v. LONGFIELD.

IN THE QUEEN'S BENCH, HILARY TERM, 1708.

[Reported in 7 Modern Reports, 148.]

INDEBITATUS ASSUMPSIT. There were several counts in the declaration; and demurrers to some, and issues taken upon others.

One of the counts, to which there was a demurrer, was this: The

<sup>1</sup> Y. B. 22 Ed. IV. f. 6, pl. 18; Anon., 8 Salk. 108; Ryley v. Parkhurst, 1 Wils. 219 (semble); Little v. Perkins, 3 N. H. 469, accord. Conf. Phillips v. Price, 8 M. & S. 180. — ED.

plaintiff declared, that whereas such a day and year the defendant was indebted to him in such a sum for nourishing Edward Longfield, at the request and instance of the defendant, and that he (the defendant) promised to pay him. There was also a *quantum meruit* for nourishing the said Edward Longfield for the same time.

The second exception<sup>1</sup> was, that the first declaration being an *indebitatus* for nourishing of Edward Longfield for such a time, there is likewise a *quantum meruit* for the same nourishing, and it is contradictory that there should be one agreement to pay so much as it should be worth, and another to pay a sum uncertain, and both stand.

And the court directed the plaintiff to enter a *non pros.* upon all but the first, and take judgment upon that; and so it was done.<sup>2</sup>

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ROBINSON v. RAYLEY.

IN THE KING'S BENCH, TRINITY TERM, 1751.

[Reported in 1 Burrow, 816.]

THIS was an action of trespass. The fifth count was for breaking and entering his free warren. Pleas, 1st, not guilty; 2d,<sup>3</sup> that as to the close called the Rabbet-Walks, "That it is one rood of land, parcel of a common field; and that Mr. Finch, in right of his prebendal estate, and all, &c., have right of common, &c., in certain fields called Middle Fields, whereof the Rabbet-Walks are parcel;" which rights he derives to himself; and so justifies under it.

To the plea to the fifth count, the replication traverses "that the cattle were the defendant's own cattle; and that they were *levant et couchant* upon the premises, and commonable cattle." To this there is a special demurrer for cause (viz: "that the replication is multifarious, and that several matters, specifying them, are put in issue, whereas only one single matter ought to be so;) and joinder in demurrer.

Poole, Serjt., for the defendant, complained of the hardship the plaintiff put upon the defendant in the 5th count, by enforcing the defendant to prove the cattle to be his own cattle, and commonable cattle; and *levant and couchant* upon the land; which hardship had obliged him to demur.

<sup>1</sup> Only so much of the case is given as relates to the question of duplicity. — Ed.

<sup>2</sup> *West v. Troles*, 1 Salk. 218 (*semble*), accord. See *Ware v. Webb*, 82 Me. 41. — Ed.

<sup>3</sup> See *supra*, note 1. — Ed.

Trespass.

Plea that Deft. had a right of common in the close.

Replication that the cattle are not Deft. own cattle, that they are not levant & couchant & not commonable.

Special Demurrer.

Held that Replication is good. ownership in cattle & that they are levant & couchant both necessary to show that they are commonable. Hence only one defense.

See De Wolf / Bevan post.

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|        |   |               |
|--------|---|---------------|
| A      | X | B             |
| Cattle |   | not           |
| not    |   | brant         |
| young  |   | +<br>couchant |



Q  
not  
Commonable.  
Dictum of man's field wrong.

If can right P<sup>l</sup>ty. may  
traverse all material al-  
legations of Plea.

He argued, that some one fact only ought to be put in issue, not several.

He cited Co. Lit. 126, a, [Letters q. r.] It must be one single certain material point. And so also Crogate's Case [the last resolution] lays down the rule accordingly, "That an issue ought to be full and single."

Now here are three distinct facts put in issue by this replication, any one of which was sufficient.

For if the cattle were not his own, or were not *levant and couchant*, they were not commonable cattle. The plaintiff might as well have put twenty facts in issue.

This, therefore, is, at least, a fault in form; and we have demurred specially, and shown this for cause: "That the replication is multifarious, and that several matters are put in issue (specifying them); whereas only one single matter ought to be so."

Mr. Yates, contra, for the plaintiff.

One part of the duplicity (viz., the cattle not being commonable) is not pointed out by the special demurrer.

However, this traverse is not double, though I agree that it numerally contains several matters; all which together make up the defendant's plea, and make one entire defence. And it is within the reason of Crogate's Case.

Whereas duplicity is, where distinct matters, not being part of one entire defence, are put in issue. For there are cases where several matters may be put in one traverse: as, for instance, a custom consisting of several parts.

Now all these parts here traversed, make one entire defence; for the cattle must be commonable, *levant and couchant*, and his own; or else it is no sufficient defence. To prove which he cited 1 Ro. Abr. 898. Letter G, Pl. 2, 3. Letters H. and I. throughout. 1 Saund. 227. The case of Stennell v. Hogg, and 2 Show. 328. The case of Manneton v. Trevilian, in point.

Poole, Serjt., in reply:

1st. As to the two matters making but one entire defence, yet being variety of facts, they ought not both to be put in issue. Crogate's Case.

And the common method is to traverse "that the said cattle were *levant and couchant*."

As to the case of Manneton v. Trevilian, I agree that the cattle ought to be *levant and couchant*. My demurrer here is in point of form, and is special.

2dly. I do not know but the party may go to issue, in some cases; but I say this is not the common form.

The case of *Hustler v. Raines*, 2 Lutw. 1399, 1401, proves nothing against me.

LORD MANSFIELD held both these demurrers to be frivolous.

The substantial rules of pleading are founded in strong sense, and in the soundest and closest logic; and so appear, when well understood and explained, though by being misunderstood and misapplied, they are often made use of as instruments of chicane.

As to the present case, it is true you must take issue upon a single point; but it is not necessary that this single point should consist only of a single fact. Here the point is, the cattle being entitled to common; this is the single point of the defence. But in fact, they must be both his own cattle, and also *levant and couchant*; which are two different essential circumstances, of their being entitled to common; and both of them absolutely requisite.

DENISON, J., concurred.

1st. As to Crogate's Case. The replication *de injuria sua propria absque tali causa* will do, in all cases where matter of title, and other things of that kind, are not included in the *absque tali causa*; and if you admit them, you may then plead *de injuria sua propria absque residuo causa*, traversing that residue. But the rule in Crogate's Case don't affect this case. For here the question is one single proposition, viz., the measure of the common; and the measure of the common is the levancy and couchancy jointly with the property.

Skinner, 137, is a more sensible report of the case of Molliton and Trevilian, than 2 Show. 328. And there the levancy and couchancy, together with the property, were esteemed to be the measure of the common, and not the levancy and couchancy only.

So that nothing more is here traversed than the measure of the common. The case is in point.

Besides, I think it is within Crogate's Case.

FOSTER, J. I am of the same opinion.

*Per cur' unanimously*

*Judgment for the plaintiff upon the demurrers.*<sup>1</sup>

<sup>1</sup> Y. B. 2 Ed. IV. fol. 8, pl. 20; *Rowles v. Lusty*, 4 Bing. 428; *Webb v. Weatherby*, 1 B. N. C. 502; *Brogden v. Marriott*, 2 B. N. C. 478; *Palmer v. Gooden*, 8 M. & W. 890; *Pigeon v. Osborne*, 12 A. & E. 715; *Bennison v. Thelwell*, 7 M. & W. 512; *Bell v. Tuckett*, 4 Sc. N. R. 402; *De Bernhardt v. Spalding*, Dav. & M. 48; *Calhoun v. Wright*, 4 Ill. 74; *Holland v. Kibbe*, 16 Ill. 133; *Deut v. Coleman*, 18 Miss. 88; *Strong v. Smith*, 8 Cal. 180; *Patcher v. Sprague*, 2 Johns. 462; *Tucker v. Ladd*, 7 Cow. 450, accord. Conf. *Giles v. Giles*, 9 Q. B. 164. — Ed.





Assumpsit against Acceptor of two  
bills of exchange.

Plea. That drawer of bills has  
given other bills in payment  
of the bills in question & that  
Pltf. agreed to forbear suing  
on these bills unless & un-  
til the others should not be  
paid.

Replication De Injuria.

Demurrer for duplicity ret.

Held that if plea is double  
the replication is good for  
it is as good as plea, & that  
plea is wholly in excuse  
hence replication good,  
V. for Pltf.

Case right.

Plea bad but cured.

*omit*

## REYNOLDS v. BLACKBURN AND OTHERS.

IN THE KING'S BENCH, JUNE 6, 1837.

[Reported in 7 Adolphus &amp; Ellis, 161.]

ASSUMPSIT against acceptors of two bills of exchange (for £285 and £340), drawn by Thomas Tempest, payable to his order at three months, and indorsed (after a mesne indorsement on each bill) to plaintiff.

Plea: That defendants, on the several days, &c., accepted the said bills respectively for the accommodation of T. T., the drawer, and without receiving any value or consideration for the said acceptance or either of them, of which the plaintiff had notice: And that, after the said bills were so indorsed to the plaintiff, and after the same had respectively become due and payable, and before the commencement of this suit, viz. on &c., the said T. T., the said drawer, gave and delivered to the plaintiff, who then accepted from the said drawer, other bills of exchange for divers large sums, in the whole exceeding the amount of the sums specified in the said bills in the declaration mentioned, viz. sums amounting to £700, and payable on certain days then to come; and it was on that occasion agreed, by and between the said drawer and the plaintiff, that the plaintiff, in consideration of the premises, should forbear to sue him, the said drawer, upon the said bills in the declaration mentioned, or either of them, for a long time, viz. three months, and until default should be made in the payment of the said bills so delivered by the said T. T., the said drawer, to the plaintiff in payment of the said bills in the declaration mentioned: And the defendants further say that the said bills were so delivered and accepted in payment of the said bills in the said declaration mentioned; and the said agreement was so made by and between the plaintiff and the said T. T., as aforesaid, without the knowledge, privity, or consent of the defendants, or any of them. Verification.

Replication, that defendants of their own wrong, and without the cause by them in the said plea mentioned, did not perform the said promises in the declaration mentioned, in manner and form, &c. Conclusion to the country.

Demurrer, assigning for causes, that the replication is double, and that it puts too many facts in issue; that it does not sufficiently confess and avoid &c.; that it does not distinctly and formally traverse &c.; and that *de injuria* is not the proper form of a replication to a plea in an action of assumpsit. Joinder in demurrer.

*Joseph Addison*, for the defendants. It cannot be contended, after some late decisions, that *de injuria* is generally an improper replication in assumpsit; that ground of demurrer is therefore abandoned. But,

although the replication *de injuria* is proper where the plea consists wholly of matter of excuse, it is otherwise where the effect of the plea is not strictly excuse, or where it partly excuses and partly denies; *Crisp v. Griffiths*,<sup>1</sup> *Whittaker v. Mason*.<sup>2</sup> Here, the plea is not wholly in excuse. And, further, the plea sets up two defences, and the replication professes to answer both. The plea alleges, first, that after the bills were due, the drawer gave the plaintiff, and the plaintiff accepted from him, bills of payment of those now in question, and allowed him time, as to those, till the new bills should be due and default made in paying them; and, secondly, that the latter bills were delivered and accepted in payment of those declared upon. The plea, therefore, contains more than one defence; the plaintiff does not demur for duplicity, but attempts, by the replication *de injuria*, to put the several matters in issue. [PATTESON, J. You attempt to set up a plea which you allege to be bad, because, as you contend, the plaintiff has made a bad replication. If your plea is double, and there is a general replication, you cannot take advantage of the fault of your plea to make the replication bad.]

*Stephen*, Serjt. *contra*, was not heard.

LORD DENMAN, C. J. There is nothing in the point. The replication is at least as good as the plea.

LITLEDALE, J., concurred.

PATTESON, J. The plea here is not partly in denial; it does not deny the matter of the declaration in any way.

WILLIAMS, J., concurred.

*Judgment for the plaintiff.*<sup>3</sup>

# STEPHENS AND ANOTHER v. UNDERWOOD.

IN THE COMMON PLEAS, JUNE 1, 1838.

[Reported in 4 Bingham's New Cases, 655.]

To an action on a bill of exchange, the defendant, the acceptor, pleaded, that before and at the time of making the acceptance, the defendant was unlawfully imprisoned by the plaintiffs, and others in collusion with them, and was then and there detained in prison, until by the force and duress of the said imprisonment he made the said acceptance; that he had never had any value for the said acceptance, or for paying the said bill of exchange, or any part thereof respectively; and that he was ready to verify.

<sup>1</sup> 2 Cro. M. & B. 159; s. c. 5 Tyr. 619.

<sup>2</sup> 2 New Ca. 359.

<sup>3</sup> *Lane v. Ridley*, 10 Q. B. 481; *O'Bannon v. Saunders*, 24 Gratt. 138, *accord.* See *Pascoe v. Vyvyan*, 1 Dowl. N. S. 939; *Regil v. Green*, 1 M. & W. 332. — ED.

Acting on bill of exchange.

Plea that it was obtained by  
duress & that there now  
was any consideration.

Special demurrer

Steld that plea is bad for du-  
plicity & that though one  
of the grounds of defence  
is badly pleaded.

Plea double though one  
branch is illpleaded & bad  
on special D.



References.

4md. 398.

Bac. Abr. Plea 1st. K. 2.

1 Keb. 661. 1 Sid. 175

Chitty, 2. 351, n. 9.

9m. 100. 196.

Q

Question is whether two  
~~good~~ defenses are set  
up or not.

Consider<sup>tion</sup> is  
Conclusion of  
law but <sup>that</sup> only defect in  
form.

**Demurrer.** For that the plea was double and multifarious, in this, that it contained two separate and distinct matters of defence to the said count, to wit, that the acceptance of the said bill in the said count mentioned, was unlawfully obtained by the plaintiffs from the defendant by duress of imprisonment; and that there never was any value or consideration for the said acceptance: also, for that the plea was so pleaded that the plaintiffs could not take or offer any certain issue thereon.

**Joinder.**

*Hoggins*, in support of the demurrer, contended that the plea was double.

*Mansell*, contra. The whole plea, though alleging several matters, constitutes only one proposition. Duress alone would not be a defence: it might render the bill voidable; 2 Inst. 482; Com. Dig. Pleader, 2 W. 19; but not void if there were a good consideration. In *Easton v. Pratchett*,<sup>1</sup> it was held that a plea that the defendant indorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of his said indorsement, and that he had not at any time had or received any value or consideration whatsoever, for or in respect of such indorsement, would be ill on demurrer. *Reynolds v. Iveney*,<sup>2</sup> and *Stoughton v. Earl of Kilmorey*,<sup>3</sup> are authorities to the same effect. In *Lacey v. Forester*,<sup>4</sup> where the plea was no consideration, Alderson, B., said, it ought to have been stated that the note was by way of accommodation; and in *Mills v. Oddy*,<sup>5</sup> Parke, P., said, the judges never contemplated the adoption of a general plea of want of consideration. If such a general plea were admissible, without stating the circumstances which occasioned the want of consideration, the plaintiff would never be apprised of the real defence. But if the second part of the plea is badly pleaded, it may be rejected as surplusage, and so the plea is not double.

*Hoggins*. *Lacey v. Forester* only decides that the onus of impeaching the consideration is cast on the defendant. Here, the alleged duress is not connected with the want of consideration; each is a distinct defence, and duress alone would avoid the contract.

**TINDAL, C. J.** It appears to me that this plea is bad, for the cause assigned in the special demurrer, viz., "that it contains two separate and distinct matters of defence, to wit, that the acceptance of the said bill was unlawfully obtained by the plaintiffs from the defendant by duress of imprisonment, and that there never was any value or consideration for the said acceptance." The answer set up is, that it is not bad, because the second ground of defence is badly pleaded; but

<sup>1</sup> 1 Cr. M. & R. 793.

<sup>2</sup> 3 Dowl. 453.

<sup>3</sup> 2 Cr. M. & R. 72.

<sup>4</sup> 2 Cr. M. & R. 59.

<sup>5</sup> 2 Cr. M. & R. 105.

the plea is not the less double because one of the grounds of defence is badly pleaded. In Comyn's Digest, Pleader, E. 2, it is laid down that "a double plea is bad, though one matter or the other be not well pleaded: as in trespass, if the defendant pleads *molliter manus imposuit* and a release, it is double, though the release is not well pleaded. R. 1, Sid. 176. Though but one of the several matters pleaded be material. Per Dod. Poph. 186." Here, notwithstanding the second branch of the plea would be ill, on special demurrer, yet the entire plea is ill, for the cause assigned.

The court was about to give judgment for the plaintiff, when

*Mansell* prayed and obtained

*Leave to amend.*<sup>1</sup>

### GALWAY v. ROSE.

IN THE EXCHEQUER, HILARY TERM, 1840.

[Reported in 6 Meeson & Welsby, 291.]

**ASSUMPSIT.** The declaration stated that the defendant, on the 21st of November, 1835, in parts beyond the seas, to wit, at Cahir, in Ireland, made his bill of exchange in writing, and directed the same to certain persons by and under the name, style, and description of Messrs. Arint & Borough, Dublin, and thereby requested the said Messrs. Arint & Borough to pay to one Captain Bushe, or his order, £397, three months after the date thereof, which period had elapsed before the commencement of the suit. The declaration then alleged that the said Captain Bushe then indorsed the said bill to the plaintiff; that it was presented to the said Messrs. Arint & Borough for acceptance, but that they refused to accept the same, whereupon the said bill was duly protested for non-acceptance, whereof the defendant had due notice; and the said plaintiff further says, that the said bill being wholly unaccepted and unpaid, afterwards, and on the day when it became due, to wit, on the 24th of February, 1836, the said bill was presented to the said Messrs. Arint & Borough for payment, but that they would not pay the same when so presented to them, but wholly declined and refused, whereupon the said bill was duly protested for non-payment, of all of which said last-mentioned premises the defendant had notice; and whereas, also, the defendant before the commencement of this suit, to wit, on the 8th of January, 1839, was indebted to the plaintiff in £800 on an account stated; and the de-

<sup>1</sup> *Bleeke v. Grove*, 1 Sid. 175; *Wright v. Watts*, 8 Q. B. 89; *Horne v. Locke*, 1 C. B. 524; *Pursford v. Peek*, 9 M. & W. 196, *accord.* — ED

Assumpsit.

Declaration that Deft. drew a bill of exchange on a firm in Dublin & that when presented for acceptance it was dishonored, that also when presented for payment it was dishonored, & that Pltff. had to pay bill & spent money in protest costs & that Deft. promised to pay him & has not done so.

Demurrer for duplicity.  
Held that Declaration is good. If viewed as two counts each sets out a distinct cause & would make two informal second counts.



If viewed as single it merely states several considerations for the promise.

Whitehead v Wharton II Amer. <sup>Bills & notes.</sup>

A later case decides that non-acceptance is a final dishonor of the bill & a subsequent dishonor by non-payment does not give rise to a cause of action.

Hence uncertain what duplicity was here. Which was the real cause of action?

Each would be good if proven without the other. But duplicity certainly present.

Case wrong.

Clitty. I, 250

This is one of the cases which make it questionable if duplicity really could

fendant, in consideration of the premises respectively, then, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said several moneys respectively on request, yet the defendant has disregarded his promise, and has not paid any of the said moneys, or any part thereof; and by reason and means of the dishonor of the said bill in the said first count mentioned, as in that count mentioned, he, the plaintiff, having indorsed and negotiated the said bill, to wit, on the day and year in the first count first mentioned, afterwards, to wit, on the day and year last aforesaid, as such indorser of the said bill as aforesaid, was called upon and obliged to pay, and did then pay and become liable to pay divers charges and expenses attendant upon and occasioned by the dishonor of the said bill as aforesaid, and the return of the same to him the plaintiff, to wit, the charges and expenses of protesting the said bill, as in the said first count mentioned, commission, postage, and divers other charges and expenses, amounting together to £10; to the damage of the plaintiff of £1000.

The defendant demurred to the first count of the declaration, assigning for causes, that the declaration stated that the bill was dishonored by the same being presented for and refused acceptance, and that the same was dishonored by being presented for and refused payment, and that either of the said dishonors was sufficient to maintain the action upon the bill to its full extent, and that it was altogether uncertain upon which of the said dishonors the plaintiff intended to rely, and that no certain or single issue could be taken; that the cause of action in the first count was stated uncertainly and in the alternative, and not directly and positively, as in effect it stated, that the bill was either dishonored by a refusal to accept or a refusal to pay; and also that the statement of the special damage to the first count was altogether insufficient and uncertain, in that although it is alleged that there were two dishonors of the bill, yet it is stated in the allegation of special damage that the costs and expenses were occasioned by the dishonor of the said bill, but by which of the said two several dishonors did not appear.

To the last count the defendant pleaded *non assumpsit*.

*Mellor*, in support of the demurrer, was in the first instance stopped by the court, who called upon

*Butt*, to support the declaration. The first count does not contain two causes of action, but only two considerations for the promise; namely, the non-acceptance and the non-payment of the bill. But if the court should be of opinion that it discloses two distinct causes of action, then they are two counts, and the demurrer is too large. [PARKE, B. They are not in the form of two distinct counts.] There is no necessity for any formal commencement; but if there be an ob-

jection on that ground, it should have been pointed out as a cause of special demurrer. *Jourdain v. Johnson*,<sup>1</sup> is an authority to show that the use of the word *respectively*, in the allegation of the promise to pay, will constitute them several counts. In a note to *Webber v. Twill*,<sup>2</sup> it is said that "the common counts in a declaration may be contained in *one* count, stating that the defendant was indebted to the plaintiff in a given sum, as for instance £1000, as well for goods sold and delivered by the plaintiff to the defendant, as for money lent and advanced, and money paid by the plaintiff to the defendant, and money had and received by the defendant for the plaintiff, and that, in consideration thereof, the defendant promised to pay:" for which position *Rooke v. Rooke*<sup>3</sup> is cited as an authority.

*Mellor*, contra. The first count is double. It is laid down as a rule in *Stephen on Pleading*, 292, "that the declaration must not, in support of a single demand, allege several distinct matters by any of which that demand is sufficiently supported." The authorities which establish this rule are collected in 1 *Chitty on Pleading*, 6th ed. 226. Now here the declaration shows a complete cause of action, by alleging a protest for non-acceptance, *Crossly v. Ham*; <sup>4</sup> it then alleges a presentment for and refusal of payment, which is another cause of action; which renders it double, and uncertain for which cause of action the plaintiff is proceeding. It is, therefore, in violation of the above rule. But then it is said it may be treated as two counts, and that the objection as to the informal commencement of the second count should have been pointed out as a cause of special demurrer; the answer to that is, that it is in effect pointed out as a cause of demurrer, when it is alleged that the count is uncertain and in the alternative, and that is sufficient. The case cited has therefore no application. The plaintiff, who has manifestly treated it as *one* count, has no right to turn round upon the defendant and say, What I have pleaded, and you have taken as *one* count, is, in reality, *two* counts informally pleaded. A party has no right so to plead as to mislead his opponent.

PARKE, B. The declaration is good, in whatever way it is viewed. If the first part of it be considered as two counts, then the word "respectively" attaches a separate promise to each count, and the only objection would be that the second count is informally commenced; but with regard to that there is no special cause of demurrer assigned. If, on the other hand, the declaration be viewed as one count only, it is equally good; for then there are different causes of action arising

<sup>1</sup> 2 C. M. & R. 564.

<sup>2</sup> Cro. Jac. 245.

<sup>3</sup> 2 Saund. 122, n. 2.

<sup>4</sup> 18 East, 502, per Bayley, J.

If you hold either part as  
surplusage then at trial  
by proving that surplus-  
age Pctf. would win his  
Case.

Trove for certain goods.

Plea That goods were sold by  
~~an~~ Falk Bros. to Pltfs' bank-  
rupts & that bankrupts gave  
a bill of exchange for same.  
That on non payment of bill &  
before bankruptcy, bankrupt  
& Falk Bros. agreed to mu-  
tually give back consideration.  
Falk Bros to give up bill. Bank-  
rupts to redeliver the goods.

That Deft. had goods in store  
all the time that Bankrupt be-  
fore bankruptcy ordered them  
to redeliver goods to Falk Bros.  
That assignee claimed goods  
but Deft. refused to deliver to.  
Refli. No agreement. No rede-  
livery.

Demurrer.

Stald bad as being double.

Robinson & Rawley considered.

out of different considerations, all of which are executed. According to the old form given in Saunders' Reports, there might be several different considerations included in one count in *indebitatus assumpsit*; and if we consider this as one count only, it amounts to this, that the defendant became liable to the plaintiff on a bill of exchange in consequence of the non-acceptance thereof, and also on account of the non-payment thereof, and also on an account stated; the whole concluding with a promise to pay. Then how does that differ from the case of the common counts, for work and labor, goods sold and delivered, &c.? By analogy to the practice before the new rules, and which seems to rest on a sound foundation, we must hold the declaration good. Before the new rules, the whole would have been in issue under the plea of *non assumpsit*, but now the defendant must traverse the facts of presentment for payment and acceptance.

The rest of the court concurred.

*Judgment for the plaintiff.*<sup>1</sup>

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DE WOLF AND ANOTHER, ASSIGNEES, &c., v. BEVAN AND ANOTHER.

IN THE EXCHEQUER, MICHAELMAS TERM, 1844.

[Reported in 2 Dowling & Lowndes, 845.]

TROVER by the assignees of K. M'Leod and J. B. Wood, bankrupts. The first count stated that the bankrupts, before their bankruptcy, were possessed of one thousand puncheons of brandy, fifty puncheons, fifty kegs, &c., and alleged a conversion after the bankruptcy.

The defendants pleaded as to five puncheons of brandy, and five puncheons, parcel, &c., that before the said K. L. & J. W. were possessed thereof as in the declaration mentioned, the defendants held and were possessed of the said brandy and puncheons, as the warehousemen and agents of certain persons, of whom the said K. L. & J. W. purchased the same; that K. L. & J. W., before they became bankrupts, purchased the same brandy and puncheons under and by virtue of a certain contract of purchase then made and entered into between them and certain other persons carrying on business by and under the name, style, and firm of Messrs. Falk Brothers, whose Christian names are to the defendants unknown, and by which said contract the said K. L. & J. W. were to purchase of and pay the said F. & Co. for the same brandy and puncheons a certain sum of money as the price and value of the said brandy and puncheons, to wit, the sum of £78 11s. 4d., to be

<sup>1</sup> See Jourdain v. Johnson, 2 C. M. & R. 564; Morse v. James, 11 M. & W. 831.

Ed.

Show me a *debt* using *debt* in *indebitatus* Counts.

secured by a certain acceptance by them, the said K. L. & J. W., of a certain bill of exchange drawn on them by the said F. & Co., payable at a certain time after date, to wit, four months; that K. L. & J. W. did purchase and pay for the same brandy and puncheons in manner aforesaid; that afterwards, from the time of such purchase as aforesaid continually up to and until the re-transfer of the same brandy and puncheons to the said F. & Co., as hereinafter mentioned, the defendants held and were possessed of, and had the custody and control of the same brandy and puncheons, as the warehousemen and agents of and for the said K. L. & J. W., which was their possession in the declaration mentioned; that afterwards, and before the said K. L. & J. W. became bankrupts, the said bill of exchange so given in payment became and was due and payable according to its tenor and effect; that K. L. & J. W. being then unable to meet or pay the said bill, the same then being and remaining in the hands of F. & Co. unpaid and dishonored; and the said last-mentioned persons then pressing for payment thereof, and then threatening to take proceedings against K. L. & J. W. to compel payment thereof, it was then and thereupon agreed by and between F. & Co. and K. L. & J. W., in consideration of the premises, and that F. & Co. would then forbear to take proceedings against the said K. L. & J. W. to compel payment of the said bill of exchange, and that F. & Co. would abandon and relinquish all claim and demand upon the said bill of exchange, and would accept the said brandy and puncheons last mentioned in satisfaction and discharge of the said bill of exchange, and of all cause and right of action thereon; that K. L. & J. W. should return, re-transfer, and re-deliver the same brandy and puncheons to F. & Co. (avowment of notice and assent to the return, re-transfer, and re-delivery of the brandy and puncheons); that afterwards, and before the defendants, or F. & Co., or either of them, had any knowledge or notice of any fiat in bankruptcy issued against K. L. & J. W. or either of them, or of any act of bankruptcy by them or either of them committed, and before either of them had become bankrupt, the same brandy and puncheons, and every part thereof, was and were accordingly returned, re-transferred, and re-delivered to F. & Co., and the same was and were then accepted by them in such satisfaction and discharge of the said bill of exchange, and they then thereupon abandoned and relinquished all claim and demand thereupon; that all property and interest in the same brandy and puncheons, then and before the defendants, or F. & Co., or either of them respectively, had any knowledge or notice that any fiat in bankruptcy had issued against K. L. & J. W. or either of them, or that any act of bankruptcy had been committed by them or either of them, and before either of

Plea complicated - what it sets forth is really an accord & satisfaction.

Plea <sup>is not</sup> ~~not~~ double - Case right.

Statement of agreement & also of carrying out good.

~~Statement~~ Statement of agreement not good with out statement of carrying it out.

Replication denies fact set out in plea, that is both.

But should have denied only one material fact, hence bad.

Party must state his whole case in the single



Traverse.

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Case goes far to  
overrule

Robinson v Rayley

n. 188.

Accord to satisfaction  
seems certainly a  
single defense.

Hence Case decides  
that you can only  
traverse one of two  
<sup>facts</sup> ~~pleas~~ in an accord  
to satisfaction.

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them had become bankrupt, reverted in and became the property in possession of F. & Co., to wit, by means of a re-delivery thereof to them by the defendants, under and by virtue of the authority of K. L. & J. W. to the defendants given in that behalf, before any act of bankruptcy by K. L. & J. W., or either of them, committed; that afterwards, and after the said K. L. & J. W. became bankrupts, the plaintiffs, as such assignees, applied to and requested the defendants to deliver up to them, the plaintiffs, as such assignees, the same brandy and puncheons, which the defendants then, and for the cause in this plea aforesaid, wholly refused to do, as they lawfully might, for the cause aforesaid, which is the conversion in the said first count mentioned and complained of. Verification.

Replication, that it was not agreed by and between F. & Co. and K. L. & J. W., as in the said plea mentioned; nor were the said brandy or puncheons in said plea mentioned, returned, re-transferred, or re-delivered, or accepted in satisfaction or discharge, as in the said plea mentioned, in manner and form as in that plea alleged; nor did the property and interest in the brandy and puncheons, before the defendants, or F. & Co., or either of them, had knowledge or notice that a fiat had issued against K. L. & J. W., or that an act of bankruptcy had been committed, revert in, or become the property, and in possession of F. & Co., by means of a re-delivery thereof to them by the defendants, under and by virtue of the authority of K. L. & J. W. before any act of bankruptcy, *modo et forma*.

Special demurrer, assigning for cause (amongst others), that the replication is double and multifarious, inasmuch as it contains two several and distinct answers; that is to say, the one a denial of the said alleged agreement, the other a denial of the alleged performance of it.

*W. H. Watson*, in support of the demurrer, contended that the replication put in issue three distinct facts; viz., the agreement, its performance, and the re-delivery of the brandy, &c., by authority of the bankrupt.

*Crompton*, contra, argued that the demurrer only pointed at the objection that two facts were put in issue by the replication; and that those facts amounted to one single matter of defence, and were, therefore, traversable. He cited *Bell v. Tuckett*,<sup>1</sup> *Robinson v. Rayley*, *O'Brien v. Saxon*, *Webb v. Weatherby*,<sup>2</sup> *Bannison v. Thelwell*,<sup>3</sup> *Pigeon v. Osborn*,<sup>4</sup> *Reynolds v. Blackburn*, *Garten v. Robinson*,<sup>5</sup> *Eden v. Turtle*.<sup>6</sup>

*Cur. adv. vult.*

<sup>1</sup> 3 M. & G. 785; 1 Dowl. 458, N. S. See s. c. 4 Scott, N. R. 402.

<sup>2</sup> 1 Scott, 477; s. c. 1 Bing. N. C. 502.

<sup>3</sup> 9 Dowl. 789. See s. c. 7 M. & W. 512.

<sup>4</sup> 4 P. & D. 345. See s. c. 12 A. & E. 715; 9 Dowl. 507.

<sup>5</sup> 2 Dowl. 41, N. S.

<sup>6</sup> 2 Dowl. 459, N. S. See s. c. 10 M. & W. 635.

The judgment of the court was delivered by

POLLOCK, C. B. The demurrer in this case was argued before my Brothers Parke, Alderson, Rolfe, and myself, during the last term. (His Lordship stated the pleadings.) Two objections were made to the replication; the first is of importance, and if decided for the defendants, it is unnecessary to consider the other. The objection is, that the traverse in the replication was multifarious and put in issue three distinct matters: first, the agreement between the bankrupts and Falk Brothers; secondly, its performance by re-delivery pursuant to the agreement; and, thirdly, a re-delivery by authority of the bankrupt notified to the defendants, which would prevent the goods passing to the assignees, as being in the apparent ownership of the bankrupts. It was answered, in the first place, and we think properly answered, that the special demurrer objected to the replication as containing two answers, — the denial of the agreement, and of the performance of it, — and not three; and that the defendants can only avail themselves of the grounds of objections for duplicity or multifariousness specially stated. *Smith v. Clinch*.<sup>1</sup> The question then is, whether the plaintiff can deny by one traverse the agreement by Falk & Co. to give up the claim on the bill against the bankrupts, and receive back the goods in satisfaction of that claim; and also the performance of the agreement by the re-delivery and acceptance in satisfaction and discharge of that claim? The rule laid down by Lord Coke, Co. Litt. 126 a, is that a special issue must be taken on one material point; and in applying the rule, the courts have held that a plaintiff is not confined to a single fact, but may include several, constituting one point of the defence; as in *Robinson v. Rayley*, *Bannison v. Thelwell*,<sup>2</sup> *Pigeon v. Osborn*,<sup>3</sup> and lastly, the case of *Bell v. Tuckett*,<sup>4</sup> in which it was decided, on the authority of the other cases, that where the defendant pleaded a release by one who executed as an agent of the plaintiff, on behalf of the plaintiff, and who was duly authorized so to do by the plaintiff, the plaintiff might include in his traverse the execution by the agent, and his authority to execute; those two facts constituting one ground or point of defence. My Brother Maule truly says,<sup>5</sup> that there is some nicety and difficulty where several facts are pleaded, in saying whether they come under this description or not; and we have had considerable doubt in the present case. A point of defence is clearly not to be confounded with the whole defence contained in the plea; otherwise there would be no distinction as to the cases in which a general traverse is allowable, and upon which nice questions have arisen;

*deinjuria*

<sup>1</sup> 2 G. & D. 225. See s. c. 2 Q. B. 335.

<sup>2</sup> 7 M. & W. 512.

<sup>3</sup> 4 P. & D. 345.

<sup>4</sup> 8 M. & G. 785.

<sup>5</sup> In *Bell v. Tuckett*, 3 M. & G. 305.

After a double pleading if party does not demur he must meet both or all points set out in the double pleading for any point left unmet will be sufficient to give that party the case. Gould, 406-7, 1 Vent. 272, Bos. Abr. Pleas. 1st. K. 1. Chitty, I, 252, note m.

Exceptions to rule vs. duplicity.

1. Action on bond may assign several breaches by statute 819 W. D. Cal. sec. 8. Chitty, I, 251
2. After 7th. rule <sup>Prof.</sup> may assign several breaches of the same contract. Chitty, I, 251.

2



and a plaintiff might in all cases deny the whole plea, though it consisted not of mere matter of excuse only, but of title or authority derived from the plaintiff. A plea may, indeed, comprise a single point of defence only, but it may also comprise several points. Thus a plea of release, or money paid in satisfaction, or license, may be considered as including one point of defence only; a plea of right of common in the old form comprises several, viz., a seisin in fee of the land in respect of which the right is claimed, a prescriptive right for certain cattle, and the putting on those cattle. All that the court did in *Robinson v. Rayley*, was to decide that the last part of such a plea formed one point of defence; though it was capable, in that case, of being subdivided into three distinct facts, viz., the ownership of the cattle, their being commonable, and levant and couchant. In some cases of common, as, for instance, for a certain number of horses, it would consist of one fact only. Had there been a replication in that case, putting in issue the whole defence, whether in the form of *de injuria*, &c., or a denial of all the matters in the plea, it would have been clearly bad. We have then to decide in the present case, whether the agreement between *Falk Brothers* and the bankrupt, and the performance of it on both sides, constitute one point of the defence or two, and, after some hesitation, we have come to the conclusion that they constitute two. The averment bears a close analogy to the plea of accord and satisfaction in the old form, disapproved of by Lord Coke in *Pinnel's Case*,<sup>1</sup> the replication to which plea, in the book of entries, traverses one part of the allegations, — *Rastall's Entries*, 627, a; and we cannot find any case in which both have been denied together. That of *Webb v. Weatherby*,<sup>2</sup> where it was pleaded that the defendant paid, and plaintiff received, a sum in satisfaction, was decided on the ground that a denial of acceptance in satisfaction would virtually imply a denial of payment, and, consequently, there was no objection to an express denial of both; and the Lord Chief Justice distinctly said, it is not a case of accord and satisfaction, and therefore, at least, no authority for the denial of both those facts in such a plea by one traverse. A case was cited, decided by my Brother Wightman, *Garten v. Robinson*,<sup>3</sup> as an authority that where a plaintiff might traverse all the facts in the plea by the general replication, he might confine himself to some of them; and so the traverse in this case, it was argued, might be supported, though it included two facts. It is a sufficient answer to say that here the plaintiff could not have traversed all the allegations in the plea, because it contained matter of title to the goods, and therefore the traversing of two facts could not, on this ground, be supported.

<sup>1</sup> 5 Rep. 117, a.<sup>2</sup> 1 Bing. N. C. 502.<sup>3</sup> 2 Dowl. 41, N. S.

*good in  
de injuria*

We are of opinion, therefore, that the replication is bad, and that the first objection must prevail; and it becomes, therefore, unnecessary to consider the second.

The plaintiff may, however, amend, on payment of costs, if he should be able to do so.

*Judgment for the defendants.*<sup>1</sup>

*over.*

### SHEPHERD v. SHEPHERD.

IN THE COMMON PLEAS, JUNE 10, 1845.

[Reported in 3 Dowling & Lowndes, 199.]

DEBT on a promissory note. The declaration stated, that the defendant on the 25th of March, 1844, made his promissory note in writing, and thereby promised to pay the plaintiff or his order, £690 on the 25th of March, 1845, which day had expired before the commencement of his suit, and then delivered the said note to the plaintiff; and thereupon the defendant then agreed to pay the amount of the said note to the plaintiff on request; whereby and by reason of the non-payment of the said sum of money an action has accrued to the plaintiff, to demand and have of and from the defendant the said sum of money. Yet the defendant has not paid the said sum or any part thereof, to the plaintiff's damage of £10, &c. To this declaration the defendant specially demurred, and assigned for causes of demurrer, that the declaration is double and inconsistent in this, to wit, that in one part it states and alleges an agreement to pay the sum of £690 on the 25th March, 1845, and in another part, that the defendant agreed to pay the said sum on request; and also, for that it is uncertain whether the plaintiff intends to rely on an express or an implied agreement, and if on the latter, that there is no sufficient consideration stated for such agreement.

*Byles*, Serjt., in support of the demurrer.<sup>2</sup>

The declaration then is bad for duplicity. In *Slade v. Drake*,<sup>3</sup> the Court said, "pleading is not talking; and therefore it is required that pleading be true, that is the goodness and virtue of pleading; and that it be certain and single, and that is the beauty and grace of pleading.

<sup>1</sup> *Bonzi v. Stewart*, 7 M. & G. 746; *Garrard v. Hardey*, 6 Sc. N. R. 459 (*semble*); *Tebbetts v. Tilton*, 24 N. H. 120 (*semble*); *Watriss v. Pierce*, 36 N. H. 232; *Satterlee v. Sterling*, 8 Cow. 233; *Tuttle v. Smith*, 10 Wend. 386; *Russell v. Rogers*, 15 Wend. 357; *McNulty v. Frame*, 1 Sandf. 128, *accord*; *Strong v. Smith*. 3 Cal. 160; *Patcher v. Sprague*, 2 Johns. 462; *Tucker v. Ladd*, 7 Cow. 450, *contra*. — *Ed*

<sup>2</sup> See *supra*, p. 188, note 1. — *Ed*.

<sup>3</sup> Hob. 295.

Debt on a note made Mch. 24/44  
& payable Mch 24/45. Allega-  
tion in addition that note  
was delivered to Pltff. & that  
thereupon Deft. assumed prom-  
ised to pay it on request.

Demurrer.

Held that declaration is  
good that the promise to  
pay on request is a mere  
nullity & of no effect.

my  
in-  
st.



Promise to pay on request is  
immaterial. It must be  
either 1. A statement of law  
& then inaccurate & bad. or  
2. It is a statement of ex-  
press promise & being  
without consideration is  
bad.

Query as to what distinction  
is made between plea &  
declarations concerning  
duplicity. →

See note to Hart  
"Longfield."

Therefore the law refuseth double pleading, and negative pregnant, though they be true, because they do inveigle, and not settle the judgment upon one point." Now the fact that one of two matters was ill pleaded did not prevent the pleading being double; *Purssord v. Peek*; <sup>1</sup> *Stevens v. Underwood*. This declaration contained substantially two causes of action; the one consisting of the promise to pay on the 25th of March, the other to pay on request. [MAULE, J. The allegation, "The defendant then agreed to pay the amount of the said note to the plaintiff on request," is immaterial, and may therefore be struck out. It is not the promise which the promissory note would sustain, and consequently is merely nonsense.] But the word "thereupon" might be considered as equivalent to "afterwards." If so, the allegation would mean that the promise to pay on request had been made after the note became due. Sufficient would then appear to sustain a count on an account stated.

*In case C.J.*  
↓

It is said that it amounts to duplicity, and that either part would afford a cause of action. There is, however, nothing to show that the rule in this respect as to pleas extends to declarations. I am, therefore, of opinion, that judgment should be for the plaintiff.

COLTMAN, J. I am of the same opinion. The allegation in the declaration, that the defendant then agreed to pay the amount of the note to the plaintiff on request, as I understand it, refers to an agreement made on the 25th March, 1844. That was a void promise altogether; and, therefore, such allegation is no more than surplusage, and if the same be struck out, a good cause of action remains. I am not aware that the insertion in a declaration of a promise, which in law has no operation, will make the declaration bad.

MAULE, J. It is said that this declaration is double, and cases have been cited, of *Purssord v. Peek*,<sup>2</sup> and *Stevens v. Underwood*, in which pleas have been held double, though ill pleaded. But the sense in which a plea may be bad, on the ground of its being double, is not the sense in which a declaration is bad for duplicity. A plea is bad if it give two substantial answers to the antecedent pleading; but a declaration is not in like manner bad for stating two causes of action.

The declaration may disclose several causes of action, as on two bonds or for two breaches of covenant, without being bad for duplicity; yet if these were each to amount to a defence, or answer to an antecedent pleading, and were inserted in one plea or replication, such plea or replication would be bad for duplicity. A declaration may be bad, when, instead of containing in it two distinct causes of action, it states two causes of action for the same claim. Thus, in an action on a

*Probably wrong unless it means several etc.*

<sup>1</sup> 9 M. & W. 196.

<sup>2</sup> 9 M. & W. 196.

bond prior to the stat. 8 & 9 Wm. III. c. 11, two breaches could not have been alleged, because one was sufficient to give the right of action for the penalty; and, therefore, the stating two on the same bond would have been bad. So if, in the present case, the declaration had suggested another ground for making the defendant liable to pay the promissory note, there might be some color for the objection which has been taken. But, in fact, the declaration shows, that the note was payable on the 25th March, and that the defendant was liable to pay it when due. An agreement then to pay the same on request does not confer any cause of action on the note, but is bad as an absolute nullity. This declaration, therefore, is not open to this objection.

CRESSWELL, J., concurred, and referred to the case of *Galway v. Rose*, as supporting the principle laid down by *Maule, J.*, respecting duplicity.

*Judgment for the plaintiff.*<sup>1</sup>

*omit*

### HARRISON v. COTGREAVE.

IN THE COMMON PLEAS, MAY 2, 1847.

[Reported in 5 *Douling & Lowndes*, 169.]

**ASSUMPSIT.** The declaration in the first count stated, that on the 16th of February, 1846, the plaintiff made his bill of exchange in writing, dated, to wit, the day and year aforesaid, and directed the same to the defendant, &c. And the defendant afterwards, and before the commencement of this suit, to wit, on the day and year aforesaid, accepted the said bill, &c.

The defendant pleaded fourthly, that the defendant accepted the said bill of exchange in the said first count mentioned, whilst he, the defendant, was an infant within the age of twenty-one years, to wit, of the age of eighteen years, the said bill of exchange being, at the time of such acceptance thereof, without any date written thereon; and that the plaintiff afterwards, to wit, on the day and year in the said first count mentioned, altered the said bill of exchange, by dating the same and writing a certain date thereon, to wit, the day and year last aforesaid, whereby the said bill of exchange was made to bear date of a day long after the making and such acceptance of the said bill, and after the time at which the defendant attained his age of twenty-one years, to wit, on the day and year last aforesaid; and that there never was any license or authority, ratification, or assent of the defendant,

<sup>1</sup> *Wilkinson v. Gaston*, 9 Q. B. 187; *Raymond v. Sturges*, 28 Conn. 146, *accord.* — Ed.

Assumpsit on a bill of Exchange  
said to be accepted by Drft.

Plea that at time of accepting  
the said bill Drft was an in-  
fant that the bill was not  
dated then but was dated  
later with a date after Drft.  
became of age but that  
Drft. never accepted such  
date or authorized such date  
after he became of age.

Answer.

Held that plea is good. De-  
fence is infancy. Facts as  
to alteration merely show  
that it was all done dur-  
ing infancy & that no ac-  
ceptance or authorized alter-  
ation took place after majority.

Why not two defenses:

- 1 Alteration.
  - 2 Infancy.
- but

here the giving of the instrument in blank authorized the holder to fill in date & hence the alteration is no defense for authorized.

but if words at top of 205 were out plea would be double for it would really deny the authority to make alteration.

hence plea good.

for or to such alteration as aforesaid, given by the defendant at any time after he had attained his age of twenty-one years. And the defendant further says, that there never was any other acceptance by him of the said bill, except as aforesaid. Verification.

Special demurrer, on the grounds, among others, that the plea is multifarious in alleging the plaintiff's infancy at the time of accepting the bill; that he accepted the bill without a date (which, as the bill is alleged in the declaration to have been dated, amounts to a denial of the acceptance and making), and that the bill was altered by the plaintiff without license or ratification by the defendant. That the plea is double, in setting up infancy, and alteration by the plaintiff without the defendant's assent. That the plea is an argumentative denial of the making and acceptance, and ought to have concluded to the country.

*Crompton*, in support of the demurrer. The plea presents several defences, and therefore throws an undue difficulty on the plaintiff in replying. The first ground of defence set up is that of infancy, which is of itself a sufficient answer to the action. Secondly, it alleges that the bill on which the plaintiff has declared, is different from the one accepted by the defendant, for it states the date of it to be different. Under the plea of *non accepit* that fact would afford a defence. Thirdly, it alleges an alteration in the bill without the assent of the plaintiff. That fact would also afford a good defence. It was impossible, therefore, for the plaintiff to reply to a plea of such a multifarious description. Again, the plea, so far as it alleged the unauthorized alteration of the date, was argumentative, as by inference it denied the acceptance as alleged in the declaration. If the defendant was able to prove the facts so alleged, he would succeed in his defence; as in *Davidson v. Cooper and Another*,<sup>1</sup> where an action of assumpsit was brought on a guaranty, the defendant pleaded, that after the guaranty had been made and signed, it had been altered in a material particular by some person to the defendant unknown, and its nature and effect materially changed, by such unknown person affixing a seal by or near to the signature of the defendant, so as to make it purport to be sealed by the defendant, and so to be his deed. There, the Court of Exchequer held, upon a motion for judgment *non obstante veredicto*, that the plea afforded a good defence to the action.

*Channell*, Serjt. (with him *Townshend*), was stopped by the court.

WILDE, J. I am of opinion that this plea is sufficient. The declaration alleges, that the defendant made his bill of exchange, to wit, on, &c.; this is not an allegation of a particular day, and the authorities

<sup>1</sup> 11 M. & W 778.

show that a bill is a perfect instrument without any date, and runs from the time of its delivery. The plea, therefore, in effect says, "I accepted the bill mentioned in the declaration, and I will tell you how and when I accepted it; it had no date, the plaintiff afterwards put in the date; and the date of the making and of the acceptance was before I was of age, therefore I am not liable." These are not several defences set up; but several allegations are made, which, together, constitute the single defence of infancy. The effect, therefore, of the plea is with reference to the alteration, that it was introduced, not without any authority in point of fact, but without such an authority as renders the defendant liable. The plea, therefore, does not disclose two defences, and is consequently good.

COLTMAN, J. I am of the same opinion. At first I doubted whether there were not two distinct defences alleged in this plea. I am, however, satisfied that that is not the case. A plea is not objectionable, because it contains two defences of such a description that the latter is incomplete without the assistance of the former. Thus, in the present instance, the former defence is infancy; the latter, an alteration of the bill; there is not, however, any allegation that the defendant did not assent to that alteration. That defence, therefore, is incomplete for want of such an allegation; an alteration is not a good defence unless the plea goes on to allege that it was made without the defendant's assent. The defendant does that by saying he gave no consent after he became of age; and then, whether he gave a previous consent or not is immaterial, and thus all the facts alleged in the plea are shown to have taken place during the infancy of the defendant.

MAULE, J. It appears to me that this is a good plea of infancy. The plea is, that the defendant accepted the bill in a particular manner; that the plaintiff afterwards, while the defendant was an infant, altered the bill by inserting a date; such alteration not being authorized by the defendant after he became of age. "The whole acceptance was complete before I came of age, and I did not ratify it afterwards." The plea of infancy is complete at the end of the first paragraph; the addition of the special circumstances do not alter it, nor do they add another defence; it stands as it did before they were introduced, "I accepted when I was an infant."

CRESSWELL, J., concurred.

*Judgment for the defendant*

one fact  $A$

2 "  $A + B$

then you can't plead  
 $A + B$  at common law.

~~but must plead A alone.~~  
~~Querry?~~

Here since authorized al-  
teration non-assumpsit  
could not be pleaded but  
anyhow non-assumpsit  
not allowed to bill or note  
by Hilary rules.



Draft.

Plea is statement that <sup>neither</sup> when writ was put in officer's hands for service nor when served did it contain any declaration or cause of action.

Drummond that plea is double.

Hold &c not double. The state of writ at time it was put into officer's hands is immaterial. Hence perflousage. Question is make it a good writ so as to hold goods when actually served.

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Add nothing material.

*omit*

JOHN RATHBONE v. SAMUEL RATHBONE.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1827.

[Reported in 5 Pickering, 221.]

DEBT. The defendant pleaded in abatement, that the writ, "at the time when it was put into the officer's hands for service, and at the time when it was served, by attaching the property of the said Samuel, contained no count or declaration; nor was there any cause of action in any way or manner set forth."

The plaintiff demurred because the plea was double,<sup>1</sup> in averring that there was no count, &c., in the writ both at the time when it was put into the officer's hands and when it was served; also in averring that there was no count or declaration, nor any cause of action set forth in the writ.

*Ashmun*, for the plaintiff. A plea is double when either of two matters alleged is alone sufficient. Here, if the want of a declaration when the writ was served was fatal, the want of one when it was put into the officer's hands was likewise, and *vice versa*. *Thayer v. Rogers*.<sup>2</sup> A plea is double when the other party cannot make one answer to it. Here there may have been a declaration when the writ was put into the officer's hands, and not when it was served; and *vice versa*. The plea alleges too that the writ contained no declaration or any cause of action. If these mean the same thing, then the same defence is repeated; which informality is fatal to a plea in abatement. But they do not mean the same thing. A declaration is a formal statement of the cause of action. In assumpsit upon an account annexed, if the account is left out, there is a declaration, but no cause of action; and if the writ has only the account annexed, there is a cause of action but no declaration. The plea, therefore, is double.

*Mills* and *Newcomb*, on the same side.

*Wells* and *Maxwell*, for the defendant.

The opinion of the court was drawn up by

PARKER, C. J. We consider the plea in abatement good, notwithstanding the causes assigned in support of the special demurrer. It is immaterial what the writ contained when it was first filled, provided it did not contain any cause of action when put into the hands of the officer to be served, and when actually served; for the question must always be, whether then when it was served it was a good writ, so as to hold the property attached. The allegation of there being no cause of action when it was put into the officer's hands for service, is surplusage and may be rejected; so that there is no duplicity.<sup>3</sup>

<sup>1</sup> See *supra*, p. 188, note 1. — ED.

<sup>2</sup> 1 Johns. Cas. 152

<sup>3</sup> See *infra*, p. 208, note 3. — ED

14 cases.

## CHAPTER V.

## DEPARTURE.

## ANONYMOUS.

IN THE COMMON PLEAS, TRINITY TERM, 1566.

[Reported in *Dyer*, 258, *placitum* 101.]

A LEASE was made by indenture for years without impeachment of waste, and one covenant was, that the lessee at every felling of wood should make a fence to save the spring; and he was bound for the performance of the covenants. And in debt on bond he pleaded the indenture, and to the said covenant pleaded that he had not felled any wood, &c. And the plaintiff showed the felling of two acres of wood, and that the defendant did not make any fence to save the spring and the defendant rejoins, that he made a fence, &c., and of that he puts himself upon the country; and the aforesaid plaintiff does the like, therefore let twelve, &c. And this was holden a jeofail and departure; and the jury at the bar discharged for this in the Bench.<sup>1</sup>

<sup>1</sup> *Co. Lit.* 804. a; *Fulmerston v. Steward*, *Plowd.* 105; *Palmer v. Stone*, 2 *Wils.* 96; *Hickman v. Walker*, *Willes*, 27; *Ellis v. Rowles*, *Willes*, 688; *Meyer v. Haworth*, 8 A. & E. 467; *Neville v. Boyle*, 11 M. & W. 26; *McAden v. Gibson*, 5 Ala. 341; *Harper v. Hampton*, 1 H. & J. 458; *State v. Dorsey*, 8 G. & J. 75; *Dawes v. Winship*, 16 Mass. 291; *Sibley v. Brown*, 4 Pick. 137; *Hapgood v. Houghton*, 8 Pick. 451; *Gildart v. Howell*, 2 Miss. 198; *Fiser v. M. & T. R. R.*, 32 Miss. 359; *Vanzant v. Shelton*, 40 Miss. 382; *Tarleton v. Wells*, 2 N. H. 306; *Moore v. Stevens*, 42 N. H. 404; *Munro v. Alain*, 2 Cal. 320; *Andrus v. Waring*, 20 Johns. 153; *Griswold v. Ins. Co.*, 8 Cow. 96; *Benjamin v. DeGroot*, 1 Den. 151; *Lindsay v. Jamison*, 4 McC. 93; *Houghton v. Jewett*, 2 Tyl. 188, *accord.* — ED.

<sup>2</sup> Y. B. 1 H. VII. fol. 16, pl. 2; *Northumberland's Case*, 5 Rep. 98; *Grenelife v. W.*, *Dyer*, 42 b; *Webb v. Weatherby*, 1 B. N. C. 505; *Kellogg v. Miller*, 6 Ark. 468; *McDaniel v. Grace*, 15 Ark. 465; *Hereford v. Crow*, 4 Ill. 423; *Porter v. Breckenridge*, 2 Blackf. 385; *Bruce v. Mathers*, 2 Bibb. 294; *Stewardson v. White*, 3 H. & McH. 455; *Lord v. Tyler*, 14 Pick. 165; *Hamp. Bank v. Billings*, 17 Pick. 87; *Hooper v. Jellison*, 22 Pick. 250; *Webber v. Sherman*, 8 Hill, 547; *Ford v. Babcock*, 2 Sandf. 518; *Day v. Abbott*, 15 Vt. 632, *accord.* — ED.

Deposition cannot appear until the Re-  
plication.

Deft on a bond to fence to save the  
spring every time Deft felled wood.

Plea that he felled no wood.

Repli. That he felled wood &  
built no fence.

Rejoir. That he built the fence.

Itzld had because a depa-  
ture.

---

Plea admits that he built no  
fence & hence replication  
denies plea in effect.

Trespass for breaking close Hatching ot.  
Plea in bar - Took damage feasant in  
black acre.

New Assignment - How trespass in white acre.  
2nd plea - Took as a heriot in white  
acre.

Held to be no departure for the  
new assignment under the old  
plea.

New assignment - Explanation of  
declaration. After a new as-  
signment Deft. can plead  
de novo.

Covenant in apprenticeship.

Plea Infancy  
Repli. Custom in London for infant  
to make such covenants.

Demurrer,

Ptff discontinued.

Held that if the 2nd pleading  
be but in support of the first  
it is all right. Ct. was divided 5-4.  
Ptff. failed.

not departure. Declaration  
on covenant. Repli. simply

*omit.*

## ODIHAM v. SMITH.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1593.

[Reported in *Croke's Elizabeth*, 589.]

ERROR of a judgment in the Common Pleas, Trinity Term, 34 Eliz. Roll 124, in trespass of his close breaking at Wytlisham, and taking an ox there. The defendant justifies for damage-feasant in Black Acre. The plaintiff made a new assignment of the trespass in White Acre. The defendant justifies there as servant to Belknap Rudstone, for that the plaintiff held of him the place, where, &c., by heriot service *inter alia servitia*, as of his manor of Paulter, and that he seized the said ox there for an heriot. Whereupon the plaintiff demurred, and had judgment. And error being now brought, Foster argued for the defendant in the writ of error, that one cause of the judgment was in the pleading.<sup>1</sup> For in the bar he justifies for damage-feasant, wherein he claims not any property; and in the rejoinder he justifies for an heriot, wherein he claims it as his; for it is contrary, and a departure. Wherefore, &c. But all the Justices severally delivered their opinions as to the objection against the pleading, holding it to be well enough; for by the novel assignment the bar is out of doors, and as if it never had been pleaded; as 27 Hen. VIII. pl. 7, is. It may be that he took an ox in Black Acre, being his own land, for damage-feasant, and another ox in White Acre, as for the heriot; so they may well stand together and if the case be so, he could not otherwise have pleaded it. Afterwards, in Mich. Term, 40 & 41 Eliz., the judgment was reversed, for the matter in law.

## MOLE v. WALLIS, OR BOLD v. WARREN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1662.

[Reported in 1 *Levinz*, 81.]

COVENANT on an indenture of apprenticeship to serve him seven years, which he had not done, but departed. The defendant pleads infancy; the plaintiff replies the custom of London, for infants to bind themselves apprentices; the defendant demurs; And whether this was a departure? was the question. And Wyndham and Foster, Chief Justice at one time, seemed that it was not, it being laid in London, where the custom is known; and Foster cited a case, where infancy being pleaded to a feoffment, the plaintiff replied the custom of gavel-kind in Kent; that an infant might make a feoffment at fifteen, and

<sup>1</sup> Only so much of the case is given as relates to the question of departure. — Ed

the action being laid in Kent, it was resolved to be good. Twysden and Mallet on the contrary said, that which is pleaded generally as the common law cannot be maintained by custom, but is a departure, and cited Yel. 14; Plowd. Com. 105; Mich. 6 H. VII. pl. 4; Hill. 21 H. VII. pl. 29; 2 Cro. 494; Hutt. 63, 64. But they agreed, that if one pleads a statute, and the other says that it is repealed, the other may say that it is revived by another statute; or, if a man pleads a statute, and the other says that it was to continue but till such a time, which is expired, the other may say, that the first statute was afterwards made perpetual, because it is only a fortifying of the first matter. And in Hilary term following, the party (plaintiff) prayed leave to discontinue.<sup>1</sup>

*mut.*

RICHARDS AND ANOTHER v. HODGES.

IN THE KING'S BENCH, TRINITY TERM, 1669.

[Reported in 2 Saunders, 88.]

DEBT upon bond by Richards and Samon against Hodges; the defendant prays oyer of the condition, which is, "That whereas Mary Bates hath of late been delivered of a man-child within the parish of St. Peter, in the town of Nottingham, to the which child the above-bound John Hodges according to law stands charged the reputed father; if therefore the said John Hodges, his heirs, executors, administrators, or assigns, or any of them, do from time to time, and at all times hereafter, fully and clearly acquit, discharge, and save harmless, as well the above-named Samuel Richards and Francis Samon, church-wardens of the parish of St. Peter aforesaid, and their successors for the time being, and every of them, and also all the inhabitants and parishioners of the said parish, which now are or hereafter shall be for the time being, and every of them, of and from all manner of costs, charges, troubles, and incumbrances whatsoever, for or by reason of the birth, education, maintenance, nourishing or bringing up of the said child, and of and from all other actions, suits, charges, troubles, and demands whatsoever, touching or concerning the same, that then, &c." And upon this the defendant pleads *non damnificatus* generally; the plaintiffs reply, that neither the defendant, nor any other, for the space of a month after the making of the bond, provided any maintenance for the infant, wherefore the parishioners, to prevent the infant from perishing with hunger and cold, during the whole time aforesaid were forced to pay, and had paid, 4s. for the maintenance and nourishment

<sup>1</sup> See Wood v. Hawkshead, Yelv. 14. — Ed.

*Statute case. Held a reviving  
st. not a departure.*

destroyed plea. Custom only used  
to destroy plea. Custom really  
not part of common law but  
must be proved by one  
pleading it. Custom of mer-  
chant in general not necessary  
to be proved. Gold, 423, contra.  
ought not Ptf. to have set out special  
Custom in his declaration?

Defendant as reputed father of a  
child made bond to Ptf. to  
maintain child & save Ptf.  
harmless from expense. Ptf.  
were church wardens.

Plea non damificatione  
Repli. That Def. did not  
maintain & so parish  
had spent 4s maintaining.

Rejoin. That Def. offered to  
maintain but parish  
would not let him & put  
baby to nurse contrary  
to his wish & etc.

Held bad for departure. 1st  
he denies the damage & then  
later gives excuse for damage.



Drummond v. Reynolds.

This bond must mean to save them  
harassment from all necessary ex-  
penses. This they did in Repli-  
Rejoinder merely destroyed repli.  
\* Hence Rej. good & case wrong.

Debt on a bond that Deft had not  
performed. Bond was to account  
for all moneys received by Deft for  
Pltf.

Plea That Deft. had accounted.  
Repli. That he had not accounted  
for certain 26 £.

Rejoinder. That money was stolen  
of which Deft. gave notice  
to Pltf. Verification.

Drummond.

Held to be no departure. Giving  
notice of theft is accounting.  
The verification is correct.

Pleading correct. Fair

of the infant, and so the parishioners were damnified, &c.; to which the defendant rejoins, that he would have nourished the infant at his own costs and charges during the whole of the said time, and offered to do it as well to the plaintiffs as to the other parishioners, but they refused to permit him to do so; and of their own wrong, and against the will of the defendant, put the infant to nurse, and paid the 4s. And this, &c., wherefore, &c. Upon which rejoinder the plaintiffs demurred in law.

And by the court: The rejoinder was bad, because it was a departure from the first plea in bar; for the defendant in his plea says, that the parishioners were not damnified; and when the plaintiffs by their replication show how they were damnified, the defendant cannot rejoin that the damnification was of their own wrong, as he has done here, but ought to have pleaded it at first in his plea in bar. And though Saunders of counsel with the defendant urged that it was not any damnification at all, because it was the voluntary act of the parish to put the infant to nurse, when the defendant himself offered to maintain it, *et volenti non fit injuria*, and they ought not to take advantage of their own wrong; yet *non allocatur*; for the court held clearly, that the rejoinder was a departure; and therefore it was adjudged for the plaintiffs.<sup>1</sup>

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VERE v. SMITH.

IN THE KING'S BENCH, EASTER TERM, 1671.

[Reported in 2 Levinz, 5.]

DEBT upon an obligation, by the plaintiff a brewer, against the defendant his clerk, conditioned to perform covenants, to account for all sums of money he should receive. Defendant pleads covenants performed. The plaintiff replies, That such a day £26 came to his hands, for which he has not accounted. The defendant rejoined, That he accounted modo sequente, viz., That certain malefactors broke into his counting-house and stole it, wherewith he acquainted the plaintiff et hoc paratus est verificare; upon which the plaintiff demurred. And now it was argued, 1st. That the rejoinder is a departure, for fulfilling a covenant to account cannot be intended but by actual accounting; whereas the rejoinder does not show an account, but an excuse for not accounting. 2. The rejoinder ought to conclude *al pais*, being an express affirmative that he accounted, in contradiction to what was denied in the replication, that he did not account. *Cur' contra.* To

<sup>1</sup> Cossens v. Cossens, Willes, 25; Cutler v. Southern, 1 Saund. 116, accord. — ED.

the 1st, this is an account, and no departure; to the 2d, it was better to conclude as here, than to the contrary; for now the plaintiff hath liberty to traverse the robbery. *Adjournatur*. But after in Trinity term the demurrer was waived, and issue taken upon the robbery.

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COLE v. HAWKINS.

IN THE KING'S BENCH, HILARY TERM, 1716.

[Reported in 1 Strange, 21.]

PARKER, C. J., delivered the resolution of the court.

This is an *indebitatus assumpsit*, laid 16th of January, 1706. The defendant has pleaded *actio non accrevit infra sex annos*. The plaintiff has replied a bill filed 23d of January, 12 Ann., and that the cause of action arose within six years before. The defendant has demurred generally, and it has been insisted on by his counsel that the replication is a departure, there being seven years distance between the day in the declaration and the filing the bill as set forth in the replication.

But we are all of opinion, notwithstanding, that the plaintiff must have judgment. This being only a parol promise, the time alleged in the declaration is only matter of form, not of substance; and not being a departure in a material point, is only a defect in form of pleading, which not being shown for cause of demurrer pursuant to the act for the amendment of the law, the defendant cannot take advantage of it. If a verdict had found the promise, or the filing the bill to be another day, that would not have vitiated the proceedings. 1 Lev. 110; 1 Keb. 566, 578; Hob. 164, 199.

If the day had been substance, it would have been a departure; and so it was adjudged in this court, Pas. 1 Geo. Stafford v. Forcer. That was upon a promissory note dated in 1704. The defendant pleaded *actio non accrevit infra sex annos*; the plaintiff replied a bill filed 12 Ann., and after a verdict the judgment was arrested, because in that case the day was material. If the day in this case should be looked upon as such, it would be in the defendant's power, in almost all cases, to fix the time and place. As where the plaintiff brings an action of assault and battery in London, the defendant pleads he made the assault in Middlesex, and that afterwards the plaintiff released all batteries except in London. By this he would make the place material, and the doctrine of bringing transitory actions where the plaintiff pleaded would fall to the ground, if the defendant should be allowed

10 Mod. 313

Construction of word account.  
See Stephen (Zyler) 232.

Indebtedness assumption laid, 1706.  
Plea action did not accrue  
within 6 years.

Repli. That bill was filed 12 years  
past due with in 6 years  
before.

Drummer.

Held to be no departure for the  
date is not a material am-  
endment.

Time ordinarily though al-  
leged exactly need not be  
proved exactly. Time not or-  
dinarily material.

Bill or note, & sealed in-  
strument, and contracts  
where time necessarily  
essential then time must  
be averred & proved exactly.

Rule generally same as to  
place. Not material unless

Makes no difference that time al-  
leged in before statute as long ago  
that St. of Lim. would have been.

atkins v W. I Chitty, 7th. 278 note.

Case right.

Deft on a bond with condition for  
performing Covenant.

Plea performance: rent

Reple. that certain was due  
at feast of St. Michael &  
unpaid.

Rejoins. That Deft. tendered the  
rent & it was refused.

Demurrer.

It held to be bad as a defor-  
time. The tender was  
not performance but ex-  
cess for performance.

In case of condition precedent.  
Excuse for non performance not  
same as performance & this  
is under statutes which allow

by artificial pleading to make the time and place matter of substance.  
*Vide* Co. Litt. 282, b. Yel. 114. *Judic' pro quer'.*<sup>1</sup>

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OWEN AND ANOTHER v. REYNOLDS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1732.

[Reported in *Fortescue*, 841.]

DEBT on bond conditioned to save harmless from tonnage of coals due to William Biddle. Defendant pleads *non damnificat*; plaintiff replies that Biddle distrained for said coals, and defendant rejoins that nothing was due to Biddle for tonnage; this held to be a good rejoinder and no departure, for it fortifies the plea, and gives a good reason why he was not damnified.

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THE COUNTESS DOWAGER OF WINCHELSEA v. HIGDEN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1732.

[Reported in 2 *Barnardiston*, 198.]

In debt upon bond the defendant craved oyer, and the condition appeared to be for performing covenants in a certain indenture, part of which were in the affirmative, part in the negative. As to the affirmative covenants he pleads *quod performavit*; as to the negative, *non infregit*. The plaintiff replies that one of the covenants was for payment of rent at the usual quarterly feasts, and that £10 10s. was arrear of it and unpaid at the feast of St. Michael, 1730. The defendant rejoins, that on the said day he tendered the money to the plaintiff, and he refused it. To this there was a demurrer, and a joinder in demurrer; and the cause specially shown was, that this rejoinder was a departure from the plea. Mr. *Bootle*, jun., argued on the part of the plaintiff, and cited Cro. Car. 76, 2 Saund. 82. Mr. *Taylor* on the other side argued, and said he did agree, that if the defendant had endeavored to excuse himself from the performance of this covenant by the act

<sup>1</sup> *Matthews v. Spicer*, 2 Stra. 806; *Serle v. Darford*, 1 Ray. 120; *Lee v. Rogers*, 1 Lev. 110; *Primer v. Phelps*, 1 Salk. 222; *Webly v. Palmer*, 1 Salk. 222; *Howard v. Jennison*, 1 Salk. 228; *Thompson v. Fellows*, 21 N. H. 425; *Burr v. Baldwin*, 2 Wend. 580, *accord*. See *Arnold v. Arnold*, 8 B. N. C. 81. — Ed.

of God or the like, this would have been a departure. But he submitted it, that upon the matter this was a performance of the covenant. In the case of *Owen v. Reynolds*, this term in the Common Pleas, the action was debt on bond with condition to save the plaintiff harmless from the tonnage of coals, the defendant pleaded *non damnificatus*; the plaintiff replied a distress taken for it; the defendant rejoined that none was due. Upon this there was a demurrer; but that court held it to be no departure. The Chief Justice agreed that case to be law; and said that the rejoinder there fortified the bar; but in the present case there is a departure; for the matter in the rejoinder goes only by way of excuse; tender and refusal being not payment, but only discharging the party from damages. For this purpose Judge Page put the case of *solvit ad diem* pleaded to debt on bond. Upon evidence, tender and refusal will not maintain the issue; which the Chief Justice agreed. Accordingly the court gave *Judgment for the plaintiff*.<sup>1</sup>

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NIBLET v. SMITH.

IN THE KING'S BENCH, JANUARY 27, 1792.

[Reported in 4 Term Reports, 504.]

THIS was a replevin for taking the goods and chattels, to wit, one lime-kiln, &c., of the plaintiff; to which there was an avowry for rent in arrear. The plaintiff, in his plea in bar, said that the lime-kiln before and at the said time when, &c., was affixed to the freehold of the piece or parcel of ground on which, &c., and as such was by law exempt from any distress for the arrears of rent in the avowry mentioned, and ought not to have been distrained for the same, &c. To this plea the defendant demurred generally.

*Holroyd*, in support of the demurrer. The plea in bar is bad on two grounds: first, it is inconsistent with, and is a departure from, the declaration, by stating the lime-kiln to be affixed to the freehold, when the declaration had alleged it to be a chattel; secondly, the lime-kiln being affixed to the freehold, no replevin will lie for it; for if the defendant should succeed, it could not be delivered to him under the writ

<sup>1</sup> *Clinton v. Bridges*, 4 Leon. 79; *Parker v. Middleton*, 8 Lutw. 126; *Chapman v. Chapman*, Cro. Car. 76; *Countess v. Crispe*, 1 Salk. 221; *White v. Clever*, Ray. 1449; *Sams v. Dangerfield*, 2 Mod. 81; *Gambier v. Larkin*, Com. 558; *Lee v. Raynor*, T. Ray. 86; *Ross v. Hodges*, Ray. 288; *Warren v. Powers*, 5 Conn. 878; *Lord v. Cockshut*, 1 H. & McH. 40; *Larned v. Bruce*, 6 Mass. 57; *Darling v. Chapman*, 14 Mass. 101; *McSherry v. Askew*, 1 Yeates, 79, accord. — Ed.

Def. is allege generally performance of all conditions precedent. Plf. in declaration must allege Excuse for nonperformance of conditions which he has actually not performed.

Replevin for Taking goods & chattel  
to wit a lime kiln.

Answer - Rent is answer.

Plia - Lime kiln not a chattel  
& hence not subject to distress.

Demurrer.

Held to be a departure. In declaration the lime-kiln is laid as a chattel. The plea state that it is affixed to realty. This is a departure.

Case goes on Eng. rule that replevin will not lie for articles detached from freehold. In general in U.S. replevin would lie & then nothing in-



...movement in Plt's action. Hence  
probably not a departure in  
U.S.

Deft. on a bond.

Deft. agreed upon condition  
which was to abide by an award  
of arbitrators concerning all things  
in dispute between Plt. & Deft. to  
be delivered by a certain day.

Plea: no award.

Repl: Showing supposed award.

Rejoinder: Setting forth rebuttal  
supposed award. ~~to~~ a

Denumer: on ground of departure.

The award was made in fact  
but was invalid because it  
included other things than  
those in controversy between Plt.  
& Deft.

Held no departure. The rejoinder  
merely sets out the supposed award  
to show its ~~at~~ invalidity. Hence  
merely supports plea of no award.

of *retorno habendo*. In Co. Lit. 145 b, it is said, that a replevin lies for goods and chattels only. And a lime-kiln is as much affixed to the freehold as doors, windows, or a furnace, which are always considered as belonging to the freehold.<sup>1</sup>

*Smith, contra.* For the reasons already given by the defendant's counsel, this lime-kiln must be taken to be affixed to, and part of the freehold, and was not therefore liable to be taken as a distress.

The court were of opinion that the plea in bar could not be supported, because it was a departure from the declaration; that the declaration, treating the lime-kiln as a chattel, might possibly have been true, because lime may be burnt in a portable oven, and the kiln need not therefore necessarily be affixed to the freehold: but that, as the plea in bar stated it to be affixed to the freehold, it was inconsistent with the declaration. *Judgment for the defendant.*<sup>2</sup>

*omit.*

### FISHER v. PIMBLEY.

IN THE KING'S BENCH, MAY 9, 1809.

[Reported in 11 East, 188.]

To debt on bond, dated 12th of March, 1807, for £300, the defendant craved oyer of the bond and of the condition, by which it appeared that the bond was given for the performance of an award of certain arbitrators to whom it was referred to arbitrate and determine concerning all causes of action, controversies, and demands whatsoever between the plaintiff and defendant, so as the award in writing under their hands should be ready to be delivered on or before the 12th of June, 1807; and then he pleaded that the arbitrators, in the condition named, did not make any award under their hands ready to be delivered, &c., on or before the said 12th of June, and this he is ready to verify, &c. The plaintiff replied that the arbitrators in the condition named, within the time limited, &c., duly made their award in writing under their hands of and concerning the premises in the condition mentioned, ready to be delivered, &c., by which they awarded that the defendant should pay to the plaintiff £124 5s. 2d. on the 8th of July, 1807, as a compensation for all the coal by him gotten in such manner as was therein before mentioned; and they thereby further awarded mutual releases up to the date of the bonds of reference; and that the

<sup>1</sup> Bro. Abr. "Chattels," pl. 7.

<sup>2</sup> Green v. James, 6 M. & W. 656; Lacey v. Umbers, 2 C. M. & R. 112, *accord.* — Ed.

plaintiff should also execute and deliver to the defendant, at his expense, a bond in the penalty of £40, conditioned to indemnify the defendant from all actions, &c., and demands by J. Rothwell (and two others by name), on account of the defendant having worked or gotten any coal out of a certain estate called Shaw Place, and a certain lane adjoining, or either of them, before the date of the bonds of reference, &c. And then the plaintiff alleged that the defendant had notice of this award, but did not pay the £124 5s. 2d., the sum awarded. The defendant rejoined that the said supposed award is in the words following, to wit, &c.; and then he set out the whole award verbatim, wherein the arbitrators stated the bonds of reference, by which it appeared that the subject of reference was of all actions, controversies, &c., and demands, between the plaintiff and defendant, as before set forth, and that the arbitrators found "that the defendant had, at the date of the said bonds, worked and gotten divers quantities of coal belonging to the plaintiff, or to him and some other person or persons, in and under a certain estate called Shaw Place, &c., and under a certain lane adjoining, &c., and that the plaintiff demands from the defendant a compensation for all the coals so gotten by the defendant." And they awarded the defendant to pay to the plaintiff £124 5s. 2d. on the 8th of July then next, "as and for a compensation for all the coal gotten by him as aforesaid;" and then they awarded the mutual releases and the bond of indemnity from the plaintiff to the defendant, as mentioned in the replication. To this rejoinder the plaintiff demurred, and alleged for special cause, that such rejoinder was a departure from the plea, and neither confessed and avoided, nor denied, the matters pleaded in the replication, &c.

The grounds of objection to the award were: 1st, its having directed the money to be paid to the plaintiff for coals stated to have been gotten by the defendant belonging to the plaintiff, or to him and some other person or persons; when the submission was confined to matters in difference between the plaintiff and defendant only. 2dly, That it directed a bond of indemnity to be given to the defendant, at his expense, against future claims and actions by three several persons, upon matters not submitted to the arbitrators, and was therefore uncertain and not final. And the validity of the first of these objections was very faintly questioned by *Scarlett*, on behalf of the plaintiff (supposing the rejoinder to be good). But against the second, he relied on *Philips v. Knightley*,<sup>1</sup> where an award that the defendant should execute a covenant to indemnify the plaintiff against all costs, damages, and expenses which should happen by means of any further proceedings in an action begun at the instance of the defendant, and at issue

<sup>1</sup> *Stra.* 908.

~~Plea is bad for trying to  
put in issue matter of  
law - the legality of the  
award, hence case  
wrong.~~

Plea sets up no award in  
fact. Rejoinder  
~~Replication~~ tries to set up  
no award in law.

Hence Departure.

~~Replication~~ would be  
Rejoinder would have  
been good if pleaded  
to declaration.

Authority vs. this case.

See note, 218.

Earlier cases but right.



in C. B., wherein Marshall *qui tam* was plaintiff, and the then plaintiff defendant, was held good. And he urged that, at any rate, if the award of the bond of indemnity were void, the award would only be void for that excess.<sup>1</sup>

The principal question, however, argued was, whether the rejoinder setting out the award in fact according to the truth, which award had been defectively set out by the plaintiff in his replication, were a departure from the defendant's plea, wherein he had before stated that the arbitrators had made no award.

*Scarlett* contended that it was a departure; for a plea of no award means no award in fact; and cited *Farrer v. Gate*,<sup>2</sup> *Skinner v. Andrews*,<sup>3</sup> *House v. Lander*,<sup>4</sup> *Harding v. Holmes*,<sup>5</sup> wherein several other cases in point were referred to, and *Praed v. The Duchess of Cumberland*.<sup>6</sup> The defendant ought to have rejoined no such award as set out in the replication; and if issue had been taken on that, and any material variance had appeared between the award set out in the replication, and the award proved, the issue must have been found for the defendant.

*Yates*, contra, was stopped by the court.

LORD ELLENBOROUGH, C. J. The last is the only point which was arguable. The award is clearly bad, inasmuch as it awards compensation to the plaintiff for coal gotten by the defendant belonging to the plaintiff, or to him and some other person or persons; and though it directs a bond of indemnity to be given by the plaintiff to the defendant against any demands by three certain persons, *non liquet* that those were the persons interested with the plaintiff in the coals which had been gotten by the defendant, and for which the compensation was awarded. The compensation, therefore, has been awarded to the one party, without any equivalent appearing on the other side. Then the award being bad, the only question is, whether the defendant can show such bad award in his rejoinder, consistently with his former allegation in the plea, that there was no award. The plaintiff in his replication sets out an award, and if he had set it out truly, it is clear that the defendant might have demurred to it; but not having set it out truly, where is the inconsistency, or departure from the plea, in the defendant's doing that which the plaintiff ought to have done, setting out the award in fact, and then demurring to the true award so set out? He thereby still maintains his former allegation, — that there was no award; in other words, that there was no legal and valid award under the submission, which is the same as no award. There is no inconsistency in this, and therefore no departure.

<sup>1</sup> *Vide Ingram v. Milnes*, 8 East, 445.

<sup>2</sup> Palm. 511.

<sup>3</sup> 1 Lev. 245.

<sup>4</sup> Ib. 85.

<sup>5</sup> 1 Wils. 122.

<sup>6</sup> 4 Term Rep. 585, and 2 H. Blac. 280.

LE BLANC, J.<sup>1</sup> The award cannot be maintained, as it was made of matters not submitted to the arbitrators; for the submission was only of matters in difference between the plaintiff and the defendant; and the award is of matters between the defendant and the plaintiff and other persons. If the matters submitted between these parties had comprehended matters in difference between the defendant and the plaintiff together with others, then an award of compensation to the plaintiff for the whole value of the coals taken, with an indemnity from him to the defendant against the claims of those others for their proportions, might have done; but the submission was not so extended. Then, as to the departure, the defendant by his rejoinder only puts the plaintiff's case in the same state on this record as it would have been if he had set out the award truly; and it only shows that the award in fact made is not a good award in point of law.

BAYLEY, J. A submission of matters in difference between A. and B. does not include matters in difference between A. and B. and others jointly; the award, therefore, was bad. Then a plea of no award means no award according to the submission; that is the plain meaning of it. I do not agree with the argument, that the defendant might have defended himself by taking issue upon the award as stated in the replication, for there was such an award as is there stated, but it was not an award made conformably to the submission, which would have appeared to be the case if the whole had been truly set out in the replication. Then the rejoinder first setting out the true award, and then demurring to it, is no more, in effect, than saying that there was no award conformable to the submission, and therefore no award; which maintains the plea. *Judgment for the defendant.*<sup>2</sup>

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GLEDSTANE v. HEWITT.

IN THE EXCHEQUER, TRINITY TERM, 1831.

[Reported in 1 Crompton & Jervis, 565.]

DETINUE on bailment of a promissory note, delivered by the plaintiff to the defendant, to be redelivered on request. Averment of a special request.<sup>3</sup>

<sup>1</sup> Grose, J., was absent from indisposition.

<sup>2</sup> Young v. Beck, 1 C. M. & R. 448; Hickes v. Crackwell, 8 M. & W. 72; Gisborne v. Hart, 5 M. & W. 50; Allen v. Watson, 16 Johns. 205, *accord.* Anon. Keilw. 175 a; Skinner v. Adams, 1 Lev. 245; House v. Launder, 1 Lev. 85; Morgan v. Man, 1 Lev. 127; Garrett v. Weeden, 1 Lev. 133; Roberts v. Marriett, 2 Saund. 188; Harding v. Holmes, 1 Wils. 122; Praed v. Duchess, 4 T. R. 585; s. c. 2 H. Bl. 250 (*semble*); Joy v. Simpson, 2 N. H. 179; Barlow v. Todd, 8 Johns. 367, *contra.* — ED.

<sup>3</sup> There was a second count on a finding.

Detainee as bailment of promissory note to be redelivered on request. Allegation of special request.

Plea Bailment as pledge & pledge not redeemed.

Repli. Offer to pay money lent as the pledge of note.

Defence for departure. Bailment admitted in replication is special & hence differs from general in declaration which is general.

Held that nature of bailment is not just material in defence but the wrong. & since Defecture must be



is a material point, no departure  
here.

Can be no departure <sup>reference to</sup> in an  
immaterial allegation.

cf Walker v Jones pg 89.

held that frustration of bailment  
stated in declaration was bad.

Plea, that before the exhibiting the bill of the plaintiff, to wit, &c., the plaintiff delivered the said promissory note to, and deposited and lodged the said promissory note with, the defendant, to be by him kept as a pledge and security for the repayment of a certain sum of money, to wit, the sum of £50, then lent and advanced by the defendant to the plaintiff, upon the faith and security of the said promissory note, and which said sum of £50 had not at any time before the exhibiting the bill, &c., been repaid to the defendant, but still remained wholly due and unpaid. By reason whereof, the defendant from thence hitherto detained, and still detains, &c., &c.

Replication, that the plaintiff, after the said depositing and lodging the said promissory note with the defendant, and before the exhibiting the bill, &c., was ready and willing, and then and there tendered and offered to pay to the defendant the said sum of £50, and then and there required the defendant to redeliver up to him the said promissory note, which the defendant then and there wholly refused to do; wherefore, &c., &c.

Special demurrer, showing for cause, that plaintiff had in his said replication departed from the declaration, and relied upon a new ground of action, and that the matters alleged in the replication did not support the declaration, but were inconsistent with it.

*Cresswell*, in support of the demurrer. This replication is a departure; it does not support the declaration, but it contains matter which would defeat the right of action as stated in the declaration. The contract stated in the plea, and admitted by the replication, is totally different from that stated in the declaration. The one alleges a general bailment, the other a bailment for a special purpose, which may be, and ought to be, traversed in the replication.<sup>1</sup>

*Wightman*, contra. The gist of the action of detinue is the detainer; *Issac v. Clarke*; <sup>2</sup> and the replication does support the declaration, because it shows the detainer to be unlawful; it cannot, therefore, be said to be a departure, for a departure is where the replication contains matter which does not support, but defeats the declaration, and varies from it in some material part.

*Cresswell*, in reply.

LORD LYNDEHURST, C. B. The question raised by this demurrer is, whether the replication is a departure. The declaration is in detinue, upon a bailment in the ordinary form, to be redelivered on request. We are of opinion, that, in the action of detinue, the detainer is the gist of the action, and that the bailment is merely inducement. Other-

<sup>1</sup> So much of the case as relates to the materiality of the allegation of bailment is omitted. — Ed.

<sup>2</sup> 1 Roll Rep. 128; Bull. N. P. 51; 2 Bulstrode, 806.

wise, in the cases where a bailment different from the one in the declaration is stated in the plea, it would have been necessary for the defendant to have traversed the bailment laid in the declaration.

In *Bateman v. Ellman*, it was determined that the bailment laid in the declaration was not material. I am therefore of opinion that there is no departure, and that our judgment must be for the plaintiff.

BAYLEY, B. I am of the same opinion.

VAUGHAN, B. I am of the same opinion.

BOLLAND, B. I concur with the rest of the court. A departure must be in something material. *Lee v. Rogers*.<sup>1</sup> The gist of the action of detinue is the detainer, and it does not appear to me that the allegation which the defendant says has been departed from, is material.

*Judgment for the plaintiff.*

*omit.*

# LEGG v. EVANS AND WHEELTON.

IN THE EXCHEQUER, HILARY TERM, 1840.

[Reported in 6 Meeson & Welsby, 86.]

TROVER against the defendants, as sheriff of Middlesex, to recover the value of certain pictures and picture-frames, of which the declaration stated that the plaintiff was "lawfully possessed as of his own property."

Plea: that, before the defendants converted and disposed of the said goods and chattels, one William Thompson had sued out of the Court of her Majesty the Queen, before the Barons of her Exchequer at Westminster, a writ of *fieri facias*, directed to the sheriff of Middlesex, commanding him of the goods and chattels of the plaintiff, to levy, &c.; and that by virtue of that writ they (the defendants) being such sheriff as aforesaid, seized, and took in execution, the said goods and chattels, for the purpose of levying the moneys so directed to be levied, which was the conversion in the declaration mentioned.

Replication:<sup>2</sup> Right of possession to the said goods at the time when by virtue of a lien; that before the said time when, &c., in the declaration mentioned, to wit, on, &c., one David Williams, being then lawfully possessed as of his own property of the said goods and chattels in the declaration mentioned, delivered the same to the plaintiff, for the purpose of the plaintiff, in the way of his trade of a carver and gilder, which he then carried on, performing certain

<sup>1</sup> 1 Lev. 110.

<sup>2</sup> The substance only of the replication is here given. — Ed.

Trove for goods alleging them to be  
Plef's property.

Plea seized by Deft, as Sheriff  
of Middlesex under a fieri facias.

Repli. that Plef. had possession of  
goods under a lien or pledge.

Demurrer for departure.

Held that if Trove the possessor  
of goods may allege property in  
them & yet later show possession  
only in some other way. Hence  
no departure.

Case right.



work and labor upon the said goods and chattels, and supplying certain materials for the same; and the plaintiff then had and received the said goods and chattels for the purposes aforesaid, and in the way of his said trade or business then performed upon the said goods and chattels certain work and labor, and supplied certain materials for the same; in respect of which said work, labor, and materials, the said D. Williams then became, and was, and from thence hitherto has been, and still is, indebted to the plaintiff in a large sum, to wit, £311 13s. 6d.; and the plaintiff further says, that after the said goods and chattels were so delivered to him as aforesaid, and whilst they remained in his possession, and before the said time when, &c., to wit, on, &c., it was agreed between the plaintiff and the said D. Williams, that, in consideration that the plaintiff, at the request of the said D. W., would draw, and indorse, for the use of the said D. W., certain bills of exchange, the plaintiff should have a right to hold the said goods and chattels for securing the payment by the said D. W. of such bills of exchange; and the plaintiff says, that afterwards, in pursuance of the said agreement, and before the said time when, &c., to wit, on the respective dates of the said bills in that plea after mentioned, he (the plaintiff), at the request of the said D. W., and for his use, drew and indorsed certain bills of exchange, to wit, &c. (setting out three bills drawn by the plaintiff upon and accepted by the said D. W., for the several sums of £55, £50, and £40, and payable to the order of the plaintiff, one at two, and the other at three months after date respectively), which said several bills, from the time they were so drawn and indorsed as aforesaid, continually until the said time when, &c., remained, and still remain, wholly unpaid by the said D. W.; and the plaintiff further says, that from the time the said goods and chattels were delivered to the plaintiff as in that plea aforesaid, until the conversion thereof in the declaration mentioned, the said goods and chattels remained in the possession of the plaintiff, and that he (the plaintiff), before and at the said time when, &c., had, and but for the said conversion thereof would still have had, a lien upon the said goods and chattels for the aforesaid sum so due to the plaintiff for the said work, labor, and materials, and a right to hold the said goods and chattels for securing the payment by the said D. Williams of the said bill of exchange; and the plaintiff, in fact, further says, that by means of the premises in this plea mentioned, and of the said lien and right to hold the said goods and chattels, and in no other manner whatsoever, the plaintiff, at the time of the said conversion of the said goods and chattels as in the declaration mentioned, was possessed of the said goods and chattels as in the declaration also mentioned; of all which premises in this plea aforesaid the defendants, before and at the time

they seized and took in execution the said goods and chattels as in the said plea alleged, had full notice. Verification.

Special demurrer, assigning for cause, that the replication was a departure<sup>1</sup> from the declaration.

*Kennedy*, in support of the demurrer.

The replication is bad, as being a departure from the declaration. The declaration alleges that the plaintiff was possessed of the goods as of his own property; but the replication sets up a mere right to the possession on the ground of having a lien on them, which is a departure from the declaration.

*Mellor*, contra.

As to the replication being a departure, surely a person having this right might declare in trover, alleging a general property, and yet, on a subsequent pleading, set up a special property, sufficient to maintain trover; it is not inconsistent with, but explanatory of, his interest. [PARKE, B. It is not a departure. Any person having a right to the possession of goods may bring trover in respect of the conversion of them, and allege them to be his property.]

ALDERSON, B., and ROLFE, B., concurred.

*Judgment for the plaintiff.*<sup>2</sup>

*mit.*

# BARTLETT v. WELLS.

IN THE QUEEN'S BENCH, JANUARY 17, 1862.

[Reported in 1 Best & Smith, 886.]

DECLARATION for goods bargained and sold, and goods bargained, sold, and delivered; and for work and labor; and for money paid; and for money due on accounts stated.

Pleas. 1. Never indebted. Issue thereon.

2. That the defendant, at the time of the contracting of the said debt, was an infant within the age of twenty-one years.

<sup>1</sup> Only so much of the case is given as relates to the question of departure. — ED.

<sup>2</sup> Thorp v. Wingfield, 3 Leon. 208; Butler v. Coll. of Phys., Cro. Car. 266; Gargrave v. Smith, 1 Salk. 221; Dudlow v. Watchorn, 16 East, 89; Winstone v. Linn, 1 B. & C. 460; Prince v. Brunatte, 1 B. N. C. 435; Arbouin v. Anderson, 1 G. & D. 408; Morris v. Walker, 15 Q. B. 589; Smith v. Marsack, 6 C. B. 486; Rixon v. Emary, L. R. 3 C. P. 546; Fowler v. Maccomb, 2 Root. 395, 396; Mathews v. Hamblin, 28 Miss. 611; Breck v. Blanchard, 22 N. H. 808; Hallett v. Slidell, 11 Johns, 56; Dutton v. Holden, 4 Wend. 648; Bame v. Drew, 4 Den. 287; Haley v. McPherson, 8 Humph. 104; Beach v. Trudgain, 2 Gratt. 219, accord. — ED.

Declaration in contract for goods has  
gained & sold. ret.

Plea; 2. Infancy.

Repli. That Deft. at time of con-  
tract falsely represented him-  
self of full age whereby Pltff.  
was induced to enter into con-  
tract.

Demurred.

Held that replication is a  
departure from declaration for  
it sets up a tort whereas  
declaration set up contract.



Replication <sup>must</sup> need not be inconsistent,  
but with Declaration, that is all. It  
need not support Dec. but merely  
overthrow plea. If it is not  
inconsistent with ~~Dec~~ Dec. it is  
not bad for Departure.

Replication bad in substance  
by law but it is no departure.  
It is not at all inconsistent  
with ~~plea~~ Dec. but thence no  
Departure.

---

If however Repli. were really a  
Declaration in tort & he had  
abandoned declaration in Cont.  
it would be departure, but here  
he did not do that he merely  
tried to knock out plea by an  
Equitable defence.

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As matter of substantive law  
infants generally not subject  
to estoppels.

Replication to the second plea upon equitable grounds: that the defendant, before and at the time of the accruing of the causes of action in the declaration mentioned, with knowledge of his true age, falsely and fraudulently represented to the plaintiff that he the defendant then was of full age, whereby the plaintiff, then having no knowledge or means of knowledge that the defendant then was not of full age, was induced to make and enter into the said contracts in the declaration mentioned, and to supply the said goods therein mentioned to the defendant; and that, but for such false and fraudulent representations as aforesaid, the plaintiff would not have entered into the said contracts or supplied the said goods, or any part thereof.

Demurrer and joinder therein.

*Gibbons*, for the defendant. First, the replication, if treated as a legal replication, is a departure from the declaration. "A departure takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another;" Stephen on Pleading, p. 32, 6th ed. The declaration is upon a contract. The replication making the liability of the defendant to depend on a false representation, converts the action into an action in tort, which cannot be done; *Manby v. Scott*,<sup>1</sup> *Johnson v. Pie*,<sup>2</sup> *Jennings v. Rundall*,<sup>3</sup> *Green v. Greenbank*.<sup>4</sup> [COCKBURN, C. J. Those cases only decided that, if goods are delivered to an infant under a contract, the party who delivered them cannot bring trover or case against him, and are not applicable to a fraudulent representation made by an infant.] The plaintiff has elected to declare on a contract.<sup>5</sup>

*Beasley*, contra. The replication is good as an equitable replication. [CROMPTON, J. In Bullen and Leake's "Precedents of Pleadings," which contains a very convenient and well-arranged collection of rules as to when a defence on equitable grounds may be pleaded, it is laid down, page 332, note (a): "Equitable replications will not be allowed which are inconsistent with the legal right alleged in the declaration." And, after citing the instances in *Hunter v. Gibbons*,<sup>6</sup> and *Gulliver v. Gulliver*,<sup>7</sup> they add: "These replications are objectionable, both as being departures from the declaration and as setting up matter for a suit in equity instead of a cause of action at law." This replication is contrary to both of the rules there laid down.]

*Gibbons* was not called upon to reply.

COCKBURN, C. J. The replication is a departure. The declaration

<sup>1</sup> Sid. 109, 129.

<sup>2</sup> 1 Keb. 905, 918, 1 Lev. 169; s. c. nom. *Johnson v. Pye*, 1 Sid. 258.

<sup>3</sup> Per Lord Kenyon, 8 T. R. 835, 836.

<sup>4</sup> 2 Marsh. 485

<sup>5</sup> Only so much of the case is given as relates to the question of departure. — Ed.

<sup>6</sup> 1 H. & N. 459.

<sup>7</sup> 1 Ib. 174

is on a contract for money payable for goods supplied to the defendant; the plea answers that; the plaintiff seeks to put the plea aside by replying a tort. That is a departure, the nature of the cause of action being changed.

CROMPTON, J. Also the replication is bad as a departure, which is an objection open on general demurrer (though there has been some doubt as to that), because it sets up a tort, the original cause of action being a contract.

MELLOR, J. I am also of opinion that the replication is a departure; and therefore, on both grounds, the demurrer ought to be allowed.

*Judgment for the defendant.*<sup>1</sup>

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## BRINE v. THE GREAT WESTERN RAILWAY COMPANY

IN THE QUEEN'S BENCH, FEBRUARY 22, 1862.

[Reported in 2 *Best & Smith*, 402.]

THE declaration stated that the plaintiff was lawfully possessed of a messuage and premises situate at Adber, in the parish of Trent, in the County of Somerset, in which messuage and premises the plaintiff and his family resided and dwelt. Nevertheless the defendants "wrongfully raised and made and formed, and caused and procured to be raised, made, and formed, a certain embankment of earth near the plaintiff's said house as aforesaid, and wrongfully continued the same from thence hitherto; by reason whereof, from thence continually to the commencement of this suit, divers large quantities of water have run and flowed down to, upon, against, and into the said messuage and premises of the plaintiff, whereby the walls, roofs, ceilings, paperings, floors, stairs, doors, and other parts thereof and therein being, have been greatly weakened, injured, wetted, and damaged; and by reason of the premises the said messuage and premises of the plaintiff became, and were, and have been, and are damp, incommodious, and less fit for habitation; and also by reason of the premises the plaintiff and his family have been, during all the time aforesaid, rendered sick and ill, and the plaintiff has been obliged to call in and employ divers medical men in and about curing the sickness and illness so occasioned as aforesaid, and to expend and lay out large sums of money in paying,

<sup>1</sup> *De Roo v. Foster*, 12 C. B. n. s. 272; *Thames Works v. R. M. S. P. Co.*, 18 C. B. n. s. 858; *Hunter v. Gibbons*, 1 H. & N. 459; *Reis v. Scott Co.*, 2 H. & N. 21; *Wheelton v. Hardisty*, 28 L. J. Q. B. 265, *accord.*—ED.

Declaration that Def't<sup>y</sup> <sup>wrongfully</sup> raised cer-  
tain Embankments on their land  
by which water flowed onto Plt'f'  
land injuring her messuage &  
alleging special damage.

Plea: Authority to erect Embank-  
ments under acts of Parliament.

Repl: That the Embankments  
were negligently erected and  
with out sufficient drains &c.  
Demurres for departure.

Held 1. That departure is mat-  
ter of substance & may be shown  
under general demurres.  
but 2. That there is no departure  
here for the declaration alleges  
a "wrongful" backing of water  
on ~~Def't~~ Plt'f' land by erecting  
Embankments. The replication  
is not wrongful & further

shows that the Def't plea does  
not cover the wrong.

---

W. thinks that P'ty. might have  
replied that St. permitted certain  
Embankments but not this im-  
properly constructed Embankment.  
This would be good but here  
P'ty. ~~might~~ ~~has~~ admitted plea  
& states that he relied on negli-  
gence. This seems to be proper  
content of Repli.. This is bad  
for departure. so can seem wrong.

"Wrongfully" in Dec. means  
nothing.

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If <sup>replication</sup> ~~plea~~ were good as denying  
that Embankment was created  
under St. it would in effect  
be a waiver of plea.

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Decla. not wide enough to  
admit of new assignment here  
thence Repli. cannot be a  
new assignment.

the same, and in and about removing and causing to be removed the said water so flowing upon and into his said messuage as aforesaid."

Second plea. That the said embankment was raised, made, and formed, and continued by the defendants, under and by virtue of the powers of certain Acts of Parliament granted in that behalf, to wit, "The Wilts, Somerset and Weymouth Railway Act, 1845," "The Great Western Railway Act, 1851," and "The Great Western Railway (Berks, Hants and Wilts, Somerset and Weymouth) Act, 1854."

Replication to the second plea. That, although true it is that the said embankment was raised, made, and formed, and continued by the defendants, under and by virtue of certain Acts of Parliament referred to in the said second plea, yet the plaintiff says that this is no bar to his claim in this action, because he says that the running and flowing of the water upon, against, and into the plaintiff's messuage, as in the declaration mentioned, was and is occasioned by the wrongful construction and negligent and improper raising, making, and forming of the said embankment, and the want of proper and sufficient drains to the same, and the continuing the said embankment so wrongfully constructed and insufficiently drained from thence hitherto, whereby and by reason whereof, after the raising, making, and forming the said embankment, and after the making and completing the railway of which the said embankment formed a part, the said running and flowing of the water upon, against, and into the plaintiff's said messuage took place, and not otherwise.

Demurrer and joinder therein.

The demurrer was argued in this term, January 24th, by —

*Montague Smith* (with him *Gadsden*), for the defendants. The replication is a departure from the declaration, not a new assignment. The declaration complains of damage to the plaintiff's dwelling-house by the wrongful erection and continuance of an embankment; the replication, admitting that the erection and continuance of the embankment were authorized by the statutes referred to in the plea, introduces a new cause of action, viz., negligence in the mode of erecting the embankment and in not providing proper and sufficient drains. The plea is an answer to the declaration, but would not be a good rejoinder to the replication; and that is a test whether the replication is a departure from the declaration. [He referred to 1 Chitt. on Plead. 674, 7th ed., by Greening, and the cases cited in note (1) to *Richards v. Hodges*.] [COCKBURN, C. J. Suppose the statutes had not been pleaded, and the case had gone down to trial, on the plea of not guilty, it would not have been necessary for the plaintiff to prove negligence

n. y.

<sup>1</sup> 2 Wms. Saund. 84 a, 6th ed.

This is like the case of an action against a person for doing something on his own land; a replication admitting that the defendant had a right to do the act, but that it was done negligently, would be a *départure*.] The replication puts forward as a distinct cause of action, not an excess of authority, but negligence in erecting the embankment; and therefore it does not support and fortify the declaration, but states a new cause of action. A departure in pleading is ground of general demurrer. [CROMPTON, J. Some doubt has been thrown upon that, but we so held in *Bartlett v. Wells*. COCKBURN, C. J. I think departure is not matter of form, but of substance.]

*J. B. Karlake* (with him *Prideaux*), for the plaintiff. First, departure is not ground of general demurrer. [CROMPTON, J. It would be inconvenient if it was not, because the only mode of taking advantage of a departure is by demurrer, and special demurrers are abolished. The defendants might have gone before a Judge at chambers and have the replication reformed. COCKBURN, C. J. That would not be a convenient or satisfactory mode of disposing of the matter. One of the grounds of our decision in *Bartlett v. Wells* was, that the replication was a departure.]

Secondly, the replication is not a departure. It is consistent with the declaration, and states the same cause of action. The declaration states that the defendants "wrongfully" erected the embankment; and that word may be taken to include negligence. The plea founded on the statutes is *prima facie* an answer to the declaration; and the replication answers the plea by showing that, though the erection of the embankment was rightful under the statutes, it was wrongful by reason of negligence. [CROMPTON, J. The word "wrongful" in this declaration may be construed to mean without any authority under law or statute. The defendants set up certain things as a lawful excuse; then the plaintiff may show that the excuse is not sufficient. COCKBURN, C. J. The plaintiff, who knows what his cause of action is, should state it as early as possible. Why, by his omission to allege negligence in his declaration, should the defendants be put to plead their Acts of Parliament?] The plaintiff, in framing his declaration, does not know what defence will be set up, and he is not bound to look through the defendants' Acts of Parliament to see whether they have a justification under them. [CROMPTON, J. The declaration in *Turner v. The Sheffield and Rotherham Railway Company*,<sup>1</sup> did not allege that the houses injured by the works of the railway company were so injured without the consent of the owners, and were not specified in the schedule annexed to the Company's Act; those allegations

<sup>1</sup> 10 M. & W. 425.







were introduced in the replication to a plea justifying under the Company's Act. The advantage of this mode of pleading is, that the authority under which the defendants did the act complained of is shown.] The cause of action is contained in the *per quod*, as in *Lawrence v. The Great Northern Railway Company*,<sup>1</sup> so that the means by which the damage was caused need not be stated. The forms of pleadings given in schedule B to the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, exclude all common words of mere form, such as "vi et armis," "wrongfully," &c. In an action for diverting the flow of a stream from the defendant's mill, No. 30, the declaration simply states "that the defendant, by cutting the bank of the said stream, diverted the water thereof from the said mill." This declaration would have been good without the word "wrongfully."

*Montague Smith*, in reply. Although the forms given in the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, have left the declaration at large, still, where negligence is the gist of the action, the declaration should allege it. [CROMPTON, J. The plaintiff should state in his declaration, as shortly as he can, the legal result of the facts which constitute his cause of action.] The plaintiff must recover on the statement of the cause of action in his declaration. Only one tenth of the damage may have arisen from the negligence, and the plaintiff may have already received compensation for that occasioned by erecting the embankment. If the declaration had charged negligence, the defendants would have pleaded, as to erecting the embankment, the authority under their statutes, and as to the negligence, not guilty; or they would only have pleaded a plea to the negligence. This declaration would have been supported without proof of negligence; whereas the replication puts forward negligence as the real cause of action, and is therefore a departure; *Palmer v. Stone*,<sup>2</sup> cited in note (1) to *Richards v. Hodges*.<sup>3</sup> [*J. B. Karlake*. *Palmer v. Stone* is commented upon by *Manning*, Serjt., in note (a) to *Evans v. Elliott*.<sup>4</sup>] [CROMPTON, J. The replication in that case set up entirely new matter.] It must be assumed that the Acts of Parliament under which the defendants justify were known to the plaintiff. *Cur. adv. vult.*

February 22. CROMPTON, J. (sitting alone), read the following judgments.

MELLOR, J. The declaration in this case alleged that the defendants, whilst the plaintiff was possessed of and residing in a certain dwelling-house, wrongfully raised and continued a certain embankment of earth near the plaintiff's said house, by reason whereof large quantities of water have run and flowed down to and upon and against the said

<sup>1</sup> 16 Q. B. 648.

<sup>2</sup> 2 Wms. Saund. 84 c, 6th ed.

<sup>3</sup> 2 Wils. 96.

<sup>4</sup> 6 N. & M. 606, 608.

dwelling-house of the plaintiff, rendering it damp and incommodious, and less fit for habitation, &c. To this declaration the defendants, for a second plea, pleaded that they raised and continued the said embankment under the powers and provisions of three Acts of Parliament granted in that behalf. To this plea the plaintiff replied that, although true it was that the said embankment was raised, made, and continued by virtue of the powers and provisions of the said Acts of Parliament, yet he said that the plea was no bar to his claim because he said that the running and flowing of the water to and against his said dwelling-house, in the declaration mentioned, was occasioned by the wrongful construction, and negligent and improper raising and making of the said embankment, and the want of proper and sufficient drains to the same. To this replication the defendant demurred, alleging it to be a departure from the declaration.

Upon the argument it was contended, by the plaintiffs, that a departure in pleading was not ground of general demurrer; but we thought this point not open for the plaintiff in this Court, after our recent decision in the case of *Bartlett v. Wells*.<sup>1</sup> See also note (1) to *Richards v. Hodges*.<sup>2</sup>

The real question on the argument was, whether the replication was a departure from the declaration. On considering what is the gravamen of the charge alleged in the declaration, I am of opinion that the replication is no departure. The substance of the complaint in the declaration is the wrongfully raising, making, and continuing an embankment near the plaintiff's dwelling-house, and by means thereof wrongfully causing water to run and flow to and against such dwelling-house, whereby it was rendered damp and incommodious, &c. The plea excuses the making and raising of the embankment under the provisions of three Acts of Parliament, to which the plaintiff in substance replies, that his complaint against the defendants is, not for the lawful exercise of the powers conferred upon them, but for causing the water to run and flow against his dwelling-house by the wrongful construction of the embankment, and by the negligent and improper raising and making it without proper drains. It appears to me that the substance of the complaint, both in the declaration and replication, is the wrongful causing of the water to run and flow against the dwelling-house of the plaintiff; and although it may be doubtful whether the

<sup>1</sup> *Peare v. McKusick*, 25 Me. 75; *Keay v. Goodwin*, 16 Mass. 1; *Joy v. Simpson*, 2 N. H. 179; *Tarleton v. Wells*, 2 N. H. 306; *Sterns v. Patterson*, 14 Johns. 182; *Andrus v. Waring*, 20 Johns. 158; *Harwood v. Tappan*, 2 Speer, 547, *accord*. But see *Serjeant Manning's note*, 6 N. & M. 607; *West v. Nibbs*, 4 C. B. 181; *Paine v. Fox*, 16 Mass. 188. Departure is no ground for a motion in arrest of judgment. *Lee v. Rayner*, T. Ray, 86. — ED.

<sup>2</sup> 2 Wms. Saund. 84 f, 6th ed.

Departure is defect in Substance.



replication is to be considered as an informal traverse of the plea, or in the nature of a new assignment, it appears to me not to be obnoxious to the very wholesome rule against departure in pleading.

In Co. Litt. 304 *a*, as cited in note (1) to *Richards v. Hodges*,<sup>1</sup> "a departure in pleading is said to be, when a man quits, or departs from the ground which he has first relied upon, and has recourse to another;" and the rule is stated by Tindal, C. J., in *Prince v. Brunatte*,<sup>2</sup> in the following terms: "Undoubtedly, where a replication does not consist with or fortify the declaration, it is a departure in pleading; for a plaintiff is not entitled to declare in respect of one right, and then to set up another in his replication. The only question here is, whether this replication does not set up a title inconsistent with that disclosed in the declaration." Another test of a departure in pleading is stated by Tindal, C. J., in *Smith v. Nicolls*,<sup>3</sup> as follows: "That which is a departure in pleading is a variance in evidence; and if the evidence in support of the replication would sustain the allegation in the declaration, there is no departure." Applying that test to the present case, it appears to me that the evidence necessary to prove the matter alleged in the replication is not inconsistent with, but would clearly support, the allegations in the declaration.

Tried therefore by the test of variance in evidence, as suggested in *Smith v. Nicolls*, I think that the objection fails, and that the plaintiff is entitled to recover on this demurrer. The case of *Palmer v. Stone*,<sup>4</sup> cited by Mr. Smith, is clearly distinguishable, inasmuch as the plea was that the defendant impounded the mare damage-feasant, which is a private trespass, whereas the rejoinder, that the mare was mangy, set up that which is a common nuisance.

I am therefore of opinion that the plaintiff is entitled to judgment.

CROMPTON, J. I concur with my Brother Mellor in thinking that the replication in this case is no departure from the declaration. The declaration is for wrongfully, that is, without lawful excuse, causing the water to flow on the plaintiff's land and against his house by means of an embankment, and so injuring his premises; and the plea is a justification for so causing the water to flow and injure the premises under the authority conferred on the defendants by three Acts of Parliament. The replication is very inartificially drawn, but it appears to me in substance to avoid the plea, either by way of informal denial that the acts complained of were justified by the authority of the statutes, or by way of showing how they were not justified.

The replication commences by a statement that it is true that the embankment was raised under the powers of the Acts, and then goes

<sup>1</sup> 2 Wms. Saund. 84 *a*, b, 6th ed.

<sup>2</sup> 1 Bing. N. C. 485, 488; 1 Scott, 842, 845.

<sup>3</sup> 5 Bing. N. C. 208, 218; 7 Scott, 147, 164.

<sup>4</sup> 2 Wils. 96.

on to show that it was negligently and improperly constructed, so as to show that it was not justified by the powers of the Acts. This seems repugnant and inartificial, but, taken according to its real meaning, seems to me to amount to saying, — though you had the authority of the Acts of Parliament, and were raising your embankment under their authority, yet you did not so construct your embankment as to make it a work done under the authority of the statutes.

The distinction is now clearly established between damage from works authorized by statute, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains; and it seems to me that the effect of the plea and replication, fairly considered as on general demurrer, is, that the plea says, what you complain of arises from works justified under statutes, and for which your remedy, if any, is for compensation; and that the replication inartificially answers this by saying the works causing the injury were not authorized by the Acts of Parliament, but were negligent and improper works, for which you are answerable in damages.

Whether the replication is a mere informal denial, or whether it explains why the plea is not a bar, or is in the nature of a replication of excess, it is not necessary to inquire.

The plea, pleaded in a compendious and general form, that the works were done under the authority of the statutes must, I think, be construed as if it contained all the necessary averments of a special plea expanded on the record, and would, I think, be bad if not construed to contain expressly or impliedly an averment that the works were such as were authorized by the Act. And to this averment the replication seems to me to contain a direct answer. It might depend on the mode in which the special plea, if expanded on the record, were framed, whether the formal mode of answering the plea would be by a denial of the averment of the acts complained of being justified by the statutory authority, or whether a new assignment or replication of excess might be rendered necessary by reason of the plea containing an averment of *quæ est eadem*, or of the acts being done under the statutory authority without any unnecessary damage. But these questions no longer arise in the general mode of pleading adopted in this case, which seems sufficient, as special demurrers are no longer allowed. It is sufficient if the replication contains, as I think it does, either a denial that the acts complained of were authorized by the statutes, or an explanation how they were not so authorized.

Suppose that this case had arisen before the new rules of pleading, when the whole matter of defence would have arisen under the general







issue of Not guilty. The plaintiff would have proved the injury to his premises by the water being thrown upon them by means of the embankment. The defendants would have shown their authority under the Acts of Parliament, and the plaintiff's answer would have been that the construction of the works was such as was not authorized by the statutes. The evidence which would prove the replication would therefore support the declaration, according to the test proposed by Lord Chief Justice Tindal, cited by my Brother Mellor; and it should be observed that the facts in the replication do not the less prove the declaration because the replication contains something more in answer to the plea than would be necessary to prove the declaration, so long as the new matter is not inconsistent with that in the declaration. The case in principle does not differ from the ordinary case of a plaintiff replying, to a plea setting up a license or authority in law, or in fact, or under a deed, that the acts were not such as were covered by the license, or were acts done in excess of it.<sup>1</sup> The plaintiff was not called upon to anticipate the defence by showing that the works were not justified by reason of an Act of Parliament which might never be set up. Such mode of pleading would probably be improper, and the matter alleged would probably have no effect on the subsequent pleadings, and be treated as merely idle; as in the case when a plaintiff alleges in his declaration that a defendant, from whom he expects a plea of infancy, was of full age when he executed the instrument declared on. Such pleading is what has been called "leaping before you come to the hedge."

I think that the plea in the present case must be taken to aver that the grievances complained of were such as were justified under the authority of the statutes, and that the replication is not in the nature of bringing forward a new cause of action, but avoids a plea either by an informal denial of the implied averments of the plea, or by stating matters which show how the plea does not answer the declaration, because the grievances in the declaration were not such as the statute authorized.

If indeed it could be made out, as argued by Mr. Smith, that the replication disclosed a new distinct cause of action, it would no doubt be a departure; but after consideration, and with great respect for the doubts thrown out in the course of the argument on this part of the case, I construe the replication as not complaining of the breach of some specific statutory duty, as for the building of a bridge or making a communication, but as averring and undertaking to prove that the construction of the works was so faulty as not to be under the protec-

<sup>1</sup> See *Bracegirdle v. Peacock*, 8 Q. B. 174, 185, 186.

tion of the statutes; in other words, as alleging that the grievances complained of in the declaration were not occasioned by the building of an embankment which the statutes authorized, because the statutes must be taken to authorize properly constructed embankments only. The replication seems to me to set up the improper construction of the embankment in question as an answer to the supposed protection under the statutes, and so to rely on the plaintiff's common-law right, claimed in his declaration, to have damages for the mischief occurring from the water being thrown on his land without any lawful excuse.

I therefore concur with my Brother Mellor in thinking that our judgment should be for the plaintiff; but the decision must be taken as the decision of him and myself only, as the Lord Chief Justice is not prepared to assent to the judgments we have delivered.

*Judgment for the plaintiff.*



Most often used in trespass quasi est.

Trespass quasi domum et clausum infringit.

Pls That trespasses were committed in Crab-hum, Black-acre, & White acre, all of which are Drft.'s freehold.

Replication Trespass was in Crab hum & Black acre, which are Pltfs. freehold abegone her est., & that the trespass was done in another place other than White acre.

Demurrer on ground that Pltfs. should not have included a traverse of part with her new assignment for after a new assignment all must be pleaded de novo.

Steld that Pltfs. may traverse the part which Drft. has properly pleaded & assign anew for the mistake.

Case right.

## CHAPTER VI.

## NEW ASSIGNMENT.

## PRETTYMAN v. LAWRENCE.

IN THE COMMON PLEAS, HILARY TERM, 1591.

[Reported in Croke's Elizabeth, 812.]

TRESPASS *quare domum et clausa sua fregit*. The defendant pleaded, that the house is called Crable-house, and one of the closes is Black-Acre, and the other is White-Acre, and pleads that they are his freehold; and so justifies. The plaintiff saith, that the trespass done was in the house called Crable-house, and in Black-Acre, which are his freehold, *absque hoc* that they are the freehold of the defendant; and that the trespass was done in another place, containing twenty acres, *alias quam* White-Acre, &c. It was thereupon demurred: for it was said, when the plaintiff makes a new assignment, so that the defendant hath not agreed to him, and hit every parcel intended in the declaration, this new assignment is as a new declaration, to which the defendant shall have a new answer in all, and is a waiver of the former pleading in all; wherefore he ought to have omitted his traverse. And of that opinion was Walmsley: but all the other justices *à contra*; for in regard that the defendant hath hit some of the places wherein the plaintiff intended the trespass, and pleaded thereto, the plaintiff may well answer to that part, and the defendant shall have no other answer; as if the defendant had hit one place, and had confessed the action therein, the plaintiff needed not make any answer thereto; and the defendant shall not waive his answer, and answer to all *de novo*. Wherefore it was adjudged for the plaintiff.

## BATT v. BRADLEY.

IN THE KING'S BENCH, TRINITY TERM, 1606.

[Reported in Croke's James, 141.]

TRESPASS *quare averia sua cepit* at Kymbolton, and chased them, &c. The defendant justifies in such a close for damage-feasant. The

*Order.*

233 (1st).

236.

238.

239.

250.

235.

241.

*Omit.**(over)*

plaintiff shows, that the place *where* was another close; whereupon the defendant demurred, pretending that the plaintiff never made any new assignment, but where the writ is *quare clausum fregit*.

<sup>1</sup> In *Martin v. Kesterton*, 2 Blackst. 1089, on a demurrer to a declaration in trespass *quare clausum fregit*, containing neither the number, names, or any description of the closes, Blackstone, J., delivered the following opinion: "I have looked into this matter with some attention. And I conceive that anciently, upon a writ of *quare clausum fregit*, the plaintiff might (and may still) declare either generally, for breaking his close at A., or might name the close in his count, as for breaking and entering his close called Blackacre in A., or might otherwise certainly describe the same. If he declared generally, and the defendant pleaded the general issue, the plaintiff might give evidence of a trespass in any part of the township of A. Heath Maxims, 12. So that for the advantage of the defendant, and to enforce the plaintiff to ascertain the place exactly, a method was devised of permitting the defendant to plead what is called the common bar, that is, to name any place, as Broomfield (true or false was immaterial), in A. as the place where the supposed trespass happened, and then to allege that such place so named was the defendant's own freehold. And, as the plaintiff could prove no trespass in Broomfield, this drove him to a new assignment of the *locus in quo*, by naming the place in certain, as a close called Blackacre, to which the defendant was now to plead afresh. And this came to be so much the course that (though it had been held in 9 Edw. IV. 23, 24, that if the plaintiff named the place in certain by his count, he could not afterwards vary from it), yet in 15 Edw. IV. 23, it was held by Brian and Littleton that it was mere nugation and surplage for the plaintiff to name the close in his declaration, and that it should not put the defendant out of his usual course of pleading the common bar and giving the close another name; and an amendment (quite contrary to what is now wished) was directed by striking the name out of the plaintiff's declaration. And Brook, abridging this case (*Travers III.*), draws from it this general rule, "That a thing put in declaration, which is not usual, shall not put the other party out of his common course of pleading." And the same is laid down as law in Hob. 16, 10 Jac. I., "That if the plaintiff in trespass assigns a place, the defendant may plead at another place, without traversing the place assigned by the plaintiff, and then the plaintiff may take a new assignment." Catesby, however, 21 Edw. IV. 18, held the contrary; that if the plaintiff names the place, the defendant shall answer to the place as laid, and shall not give it another name. At length Fairfax, 22 Edw. IV. 17, lays down the rule very clearly, and reconciled the whole by taking this difference, "If the plaintiff gives a name by his writ, the defendant cannot vary from this name. But if the writ be only in general, *quare clausum fregit*, and the plaintiff gives a name in his count, this shall not bind the defendant, but he may give the plaintiff another name, and change the name he has given. But if the name be in the writ and also in the count, then it cannot be varied from." That is, in short, that upon a general writ the plaintiff ought not to declare specially; and if he does, the special name is surplage. And so it was understood, 5 Hen. VII., 23, Bro. Trespass, 277. "*Hoc patet* that in a general writ of trespass the defendant may give a name, but the plaintiff in his count cannot give it a name."

And as it became the practice to sue out only general *clausum fregit*, and the law was held that upon such general writs the plaintiff either could not at all, or could not to any conclusive effect, count of any close in certain, the mode of declaring generally, pleading the common bar, and making a new assignment, seems to have been universally adopted. See *Aston*, 505, in 11 Eliz., and all Coke's Entries of Cases

But if the deft  
pleaded libe-  
am tunc mentur  
that admitted  
the trespass &  
was plea for  
claim only  
raised the  
writ whether  
left named  
Broomfield  
so reasoning  
seems wrong  
Broomfield  
Hob. 16, 10 Jac.  
traversed that  
Broomfield  
was the place  
of trespass &  
then the in-  
sue would  
be whether  
def't trans-  
gressed there  
where. The  
true way  
would be  
then for def't to allege that his land was in  
Broomfield & then deny def't's possession of  
Broomfield & if def't joined issue & could  
then prove a possession of Broom-  
field. But old pleading, of *liberum*

Trespass for taking & chasing cattle.

Plea damay feasant in certain close.

Repli: Place where is another close.  
<sup>den.</sup> because not quasi clausum fregit.  
Held to be a new assignment. Can  
have it in other actions.

Can have new assignment  
in other actions besides quasi  
clausum fregit.

N.A. a dilatory mode of  
pleading and hence etc  
disfavoured it in modern  
times. Made Plef. de-  
clar. specially.

→  
Dec. general: Plea. liberum tenementum, in Brem-  
field. If deft can prove a freehold in any land  
in parish he would win. (cf Coker v. Crompton) Plef  
∴ cannot have it & so must new assign.  
see Chitty, Real, I, 688-689



Prepared for entering Drft's house & staying  
therein 3 weeks tot.

Plea as to 24 hours of said time &  
Entry, taking goods tot. a fine & fines.

Repli. De injuria suo proprio ab.  
que tota ea residua causa.

Testification was given but also  
that Drft. stayed more than 24  
hours.

It is said that Pley. could not take  
advantage of the under plead-  
ings, as he had not made the  
time material. He should  
have been assigned.

Time stated in Dec. was im-  
material.

Staying 3 weeks was probably  
not a substantive <sup>allegation</sup> ~~defect~~.

It was put in to allow  
Pley. to get greater damages.  
Pley. must state time long  
enough to cover his claim.  
Two cases.

1. Single act & aggravation  
Aggravation stated in Dec.

The court held the contrary. Wherefore it was adjudged for the plaintiff.<sup>1</sup>

MONPRIVATT v. SMITH AND ANOTHER, SHERIFF OF  
MIDDLESEX.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JUNE 7, 1809.

[Reported in 2 Campbell, 175.]

TRESPASS for breaking and entering the plaintiff's house, staying therein three weeks, and seizing and carrying away his goods.

in the Common Pleas, for in the proceedings by bill in the King's Bench the declarations are all of a place certain. But as this practice was circuitous and full of delay, a rule was made in the Common Pleas about the time of Heath, Max. 18 (and he was Chief Justice in Charles the First's time), for the benefit of plaintiffs, to permit them to declare in certain; which was afterwards ingrafted into the code of rules, A. D. 1654, and is clearly only permissive, and not compulsory upon the plaintiff.

"The declaration upon an original or bill *quare clausum fregit* may mention the place certainly, and so prevent the use and necessity of the common bar and new assignment," § 17; but when the plaintiff has so declared, § 19, is peremptory on the defendant, "that the common bar and new assignment be forborne, where the declaration contains the certainty equivalent to a new assignment." And that it was so understood at the time, and immediately after, appears from the many precedents to be met with in the books of general declarations, with the common bar, and new assignment, subsequent to 1654. As in Lilly, 444, 88 Car. 2, Lutw. 1801, 1872, 1885, 1899, 1467, from 86 Car. II. to 9 W. III. For the practisers could not be induced all at once to depart from their ancient forms; though as the new regulations were evidently calculated for the benefit of the plaintiff, by preventing circuitry and delay, the old practice gradually wore out; and the last of these general declarations which I have seen (till the present) is in the Common Pleas, 5 Geo. I. Still, however, the law permits the plaintiff to use this circuitry and to delay himself, if he be so advised; and therefore the reporter of Elwis and Lomb, H. 2 Ann. in the King's Bench, 6 Mod. 119, is a little mistaken, or has expressed himself ambiguously in one point, by supposing the rule to be compulsory on the plaintiff instead of optional. If we read *may*, instead of *shall*, what he represents the court to have said will be perfectly right. "Now there is a fixed course established in the Common Pleas, that in local actions the plaintiff shall ascertain the place in his declaration, to prevent such general pleas and the prolixity of a new assignment; and the defendant is confined to the place ascertained in the declaration." Salkeld, in reporting the same case, 458, states the manner of declaring to be still optional in the plaintiff. "In trespass *quare clausum fregit* in D. (i. e. without naming the close), if the defendant plead *liberum tenementum*, and issue be joined thereon, it is sufficient for the defendant to show any close that is his freehold. But if the plaintiff gives the close a name, he must prove a freehold in the close named. So adjudged in the Common Pleas, and the judgment affirmed in the King's Bench on a writ of error."

<sup>1</sup> Coke v. Evans, 2 Salk. 453; Cockley v. Pagrave, Freem. 238, accord. Conf. Elwis v. Lombe, 6 Mod. 117. — ED.

Pleas, 1. Not guilty to the whole. 2. As to breaking and entering the house, and staying therein twenty-four hours, part of the said time in the said declaration mentioned, and also as to seizing and carrying away the goods, a justification under a writ of *feri facias*. Replication to last plea, admitting the writ, *de injuria sua propria absque residuo causæ*.

The defendants proved their justification; but it appeared that their officers continued in the plaintiff's house beyond twenty-four hours.

*Garrow* and *Wigley*, for the plaintiff, contended, that the excess beyond twenty-four hours stood merely upon the plea of not guilty; and as the defendants had been proved to have been guilty of remaining in the house longer than they pretended to justify, the plaintiff was entitled to a verdict and damages for what he had thereby suffered.

LORD ELLENBOROUGH. I am of opinion that the last plea, in point of law, applies to the whole declaration, and that if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment. As the pleadings now stand, the residue of the cause mentioned in the plea is alone put in issue, and the length of the time during which the officers remained in the house is rendered immaterial.

The plaintiff was nonsuited.

*Garrow* and *Wigley*, for the plaintiff.

*Park*, *Marryat*, and *Lawes*, for the defendants.<sup>1</sup>

## PRATT v. GROOME.

IN THE KING'S BENCH, FEBRUARY 11, 1812.

[Reported in 15 East, 235.]

TRESPASS *quare clausum fregit*, parcel of Fen Mead in the parish of Totternhoe, in the county of Bedford. There were other counts laying the close in the parish of Eaton Bray, and in Totternhoe and Eaton Bray. The defendant pleaded the general issue; and, secondly, after averring the closes in the different counts to be one and the same, that the *locus in quo* is parcel of a common field called Fen Mead, which is divided into allotments holden of the lord of the manor of Eaton Bray, and within the jurisdiction of the leet jury of

<sup>1</sup> *Scott v. Dixon*, 2 Wils. 8; *Pyewell v. Stow*, 8 Taunt. 425; *Ditcham v. Bond* 8 Camp. 524; *Kavanagh v. Grudge*, 7 M. & G. 816; *Aldred v. Constable*, 6 Q. B. 870, *accord*. See also *Lambert v. Hodgson*, 1 Big. 817; *Gale v. Dalrymple*, 1 Camp. 381; *Bowen v. Parry*, 1 Camp. 394. *Conf. Barnes v. Hunt*, 11 East, 451. — Ed.

when sp. dam. is claimed it must be set out though in material to right of action.

2. In one Dec. Pldf. goes for several distinct trespasses. Case close to him. Argue two acts 1. Entering, 2. Staying & carrying away goods. But Ct. hold true construction one trespass with aggravation in way of stay. In latter view length of stay only material on ? of damages.

Case right.

A plea to half dec. not bad on Decr. Pldf. would only get d. on other half.

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Trespass in certain closes.

Pleas. 1. Guilt Issue. 2. That locus in quo was Dft's freehold under an allotment by local jury of manor.

Repli. That the closes are not closes mentioned in 2nd. plea but different closes describing them by meter & bounds. Plea to this: Not guilty.

Pldf. only proved the trespass in the close stated by Dft. in 2nd plea. Lower Ct. directed verdict for Pldf. on Guilt Issue but for Dft. on not guilty to new assignment.

Held that direction was correct but Pldf. given leave to amend Repli.

Plf. made new assignment to avoid the issue of Justification, if possible. But. Ct. held that new assignment denied that the close mentioned in second plea was the close & hence not guilty to M.A. denied that Def. had gone on any other close than one mentioned in 2nd plea.

The statement in Repli. as to its not being same close is material.

At time of case "not guilty" was a guilt denial of former pleading & hence put the fact in issue.

After Hilary rules "not guilty" would not have denied this. He would have had to traverse that it was different close.

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the said manor. The plea then set forth a custom for the leet jury to meet at certain specified times, and to set out the bounds of the different allotments in the common fields within the manor: that the defendant was seised in fee of a certain allotment within Fen Mead holden of the lord, and within the jurisdiction of the leet jury, and adjoining to an allotment also within Fen Mead, &c., possessed by the plaintiff; that the jury set out and determined that the *locus in quo* was parcel of the said allotment of the defendant, and was his close, soil and freehold, &c. The plaintiff in his replication, after setting out the abutments to the closes in each of the counts of the declaration, concluded thus: "Which said closes above newly assigned were and are other and different closes than the said allotment, or piece, or parcel of land of the defendant in his said last plea mentioned." To this the defendant pleaded not guilty. At the trial before Mansfield, C. J., at the last assizes for the county of Bedford, the plaintiff's counsel, in opening his case, did not pretend to be able to prove a trespass anywhere but on the spot allotted to the defendant by the leet jury; whereupon the learned judge directed the jury to find for the plaintiff on the general issue only, and for the defendant on the not guilty to the new assignment; which they accordingly did.

*Sellon*, Serjt., in Michaelmas term, obtained a rule *nisi* for a new trial, or to enter a verdict generally for the plaintiff, notwithstanding the verdict for the defendant on the other issue.

*Blosset*, Serjt., now showed cause, and contended that the plaintiff under this form of pleading had no right to show a trespass in the place which the defendant by his plea claimed as his allotment; for by his new assignment the plaintiff had waived the trespass to which the defendant had before pleaded in bar. In support of this he cited Bull. N. P. 92; *Freeston v. Crouch*; <sup>1</sup> *Freeston v. Standford*; <sup>2</sup> 1 (Williams's) Saund. 299, n. 6, and 2 Saund. 5.

LORD ELLENBOROUGH, C. J., said there could be no doubt that the not guilty to the new assignment put the whole of it in issue, a part of which was that the close was different from that mentioned in the plea. The court therefore thought the direction of the learned Chief Justice at the trial right, but they gave the plaintiff leave to amend on payment of costs.

GROSE, J., had left the court, and LE BLANC, J., was absent at Horsemonger-lane.<sup>3</sup>

<sup>1</sup> Cro. Eliz. 492.

<sup>2</sup> Cro. Eliz. 855.

<sup>3</sup> *Freeston v. Crouch*, Cro. El. 492; *Freeston v. Standford*, Cro. El. 855; *Oakeley v. Davis*, 16 East, 82; *Darby v. Smith*, 2 M. & Rob. 184; *Boynton v. Willard*, 10 Pick. 166, *accord*. See *Atkinson v. Matteson*, 2 T. R. 176-7; *Hall v. Middleton*, 4 A. & E. 107. Conf. *Bolton v. Sherman*, 2 M. & W. 395; *East. Co.'s R. R. v. Dorling*, 5 C. B. N. S. 821 — Ed.

## TAYLOR v. SMITH.

IN THE COMMON PLEAS, NOVEMBER 9, 1816.

[Reported in 7 Taunton, 156.]

TRESPASS for that the defendant, on 17th October, 1815, stopped the plaintiff's cattle and cart. Plea, not guilty; and justification that the plaintiff was loading his cart with turf, which he had wrongfully cut from the waste of the manor of Clapham, and the defendant, as bailiff of the lord, took it from him. The plaintiff replied to the justification, *de injuria sua*, and newly assigned, that the defendant on other days and times did the trespasses complained of; and upon the trial, before Lord Ellenborough, C. J., at the Guilford Summer Assizes, 1816, he proved a license from the lord to cut the turf. Verdict for the defendant, which *Onslow*, Serjt., now moved to set aside, on the ground that, upon the evidence of the license, the verdict ought to have been for the plaintiff.

The court held clearly, 1. That a single act only of trespass being laid, and not *diversis vicibus et diebus*, and that act being covered by the defendant's plea of justification, there could be no new assignment. 2. That the license, not being replied, could not be given in evidence to rebut the justification, and therefore the verdict was right, and they *Refused the rule.*<sup>1</sup>

<sup>1</sup> "The court were clearly of opinion against the plaintiff on both grounds. They held that the replication was double. It was an attempt by a new assignment to amplify the cause of action stated in the first count. The plaintiff declared in that count for one breaking and entering; this was justified, and after issue taken on that justification, he attempted to make a new assignment of other matter; which was irregular. They said it was the same as if, to an action of trespass for breaking and entering the plaintiff's close, generally, in such a parish, the defendants were to plead that the trespass complained of was in a close there called Whiteacre, which was his own soil and freehold; and then the plaintiff were to reply, admitting that it was in Whiteacre, and taking issue upon the defendant's soil and freehold; and after that, should go on to state that he meant also to go for a trespass in Blackacre; which was not allowable. So with respect to the single act of trespass complained of in the third count; that also was justified; and after taking issue on the matter of that justification, the plaintiff, without alleging any different fact, made a new assignment of the same matter; so that there would be two issues to be taken on the same fact. They observed that the object of a new assignment was to give the go-by to all that the defendant had pleaded, by saying that the trespass stated and justified by the defendant was not that which the plaintiff had complained of in his declaration, but some other which is stated." *Cheasley v. Barnes*, 10 East, 79; *Lucas v. Nockells*, 10 Bing. 169, per Parke, B.; *Thomas v. Marsh*, 5 C. & P. 596; *Polkinhorn v. Wright*, 8 Q. B. 197; *Gisborne v. Wyatt*, 8 Dowl. P. C. 505; *Meriton v. Coombes*, 9 C. B. 787, *accord*. See *Smith v. Powers*, 18 N. H. 216. — Ed.

trespass for stopping Ptf. Cart on a certain day.

Plea that Ptf. was cutting turf on waste land of manor & justified stopping him as bailiff to land of manor.

Repli. De injuria & new assignment of other days & times.

Ptf. found a license to cut turf. Told that v. for Def. is correct.

Ptf. cannot take issue on a justification to the single act he alleged in Dec. & also new assign other acts. That the license to be admissible in Evidence should have been specially replied.

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Here date not material, but fact that it was a single trespass was material. He could not change a single trespass into many trespasses. Ptf. should have pleaded the license in C. & A. to avoid plea.

The party pleading affirmative always to advantage.



Testimony for entering close of P'tyf.  
Called Hold-yard in certain part of  
Plea. That said close is Deft's close.  
Repli. That said close is not Deft's as  
alleged.

On Evidence it appeared that both  
P'tyf. & Deft. owned closes either  
of which would answer descrip-  
tion. Deft. claimed right to  
the action by evidence of his close  
& that P'tyf. should have new as-  
signed.

Held that P'tyf. need not new assign.  
The Dec. alleges the close specifi-  
cally & Deft. should have given  
abuttals to his close if he wished  
to make P'tyf. new assign. The  
Evidence must be referred to  
P'tyf's close as alleged in the Dec.

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Why did not Deft. win case? He had  
affirmation & proved his plea.  
Suppose Dec., Aff. Plea, Aff. Repli., Neg. Rej.  
Only thing tried is truth of Repli.

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Here there was ambiguity in  
plea & any generality in  
pleading would favor the  
affirmative pleader which

## COCKER v. CROMPTON AND OTHERS.

IN THE KING'S BENCH, APRIL 22, 1823.

[Reported in 1 Barnewall &amp; Cresswell, 489.]

TRESPASS for breaking and entering the plaintiff's close, called the Fold-yard, situate in the parish of Prestwick *cum* Oldham, in the county of Lancaster. Plea, that the said close in the said count mentioned, and in which, &c., now is, and at the said time when, &c., was the close, soil, and freehold of the said defendant Crompton; wherefore he, in his own right, and the other defendants, as his servants, broke and entered the same, &c. Replication, that the said close was not the close, soil, and freehold of the said defendant Crompton, as alleged. At the trial before Holroyd, J., at the last Lancaster assizes, it was proved that the plaintiff was in possession of a close, called the Fold-yard, and that a trespass had been there committed; but it appeared that Crompton also had a close called the Fold-yard, in the same parish; whereupon it was objected for the defendants, that they were at liberty to apply all the evidence to that close, and that the plaintiff must, therefore, be nonsuited. Holroyd, J., reserved the point, and the plaintiff having obtained a verdict,

Cross, Serjt., now moved for a rule *nisi* to enter a nonsuit. It must be admitted, that, according to an anonymous case in Dyer's Reports,<sup>1</sup> "If in trespass for breaking a close the defendant plead that the place is six acres of land in D., which are his freehold, and the plaintiff reply that they are his freehold, and not the freehold of the defendant; if the plaintiff have six acres in D., and the defendant other six, the defendant cannot give in evidence that he did the trespass in his own land." But in Goodright v. Rich,<sup>2</sup> Lawrence, J., says, "Notwithstanding the case in Dyer, according to the modern practice, if the defendant plead *liberum tenementum*, the plaintiff is driven to a new assignment, in which he must specify the close; otherwise, if the defendant prove his title to any land falling within the general description mentioned in the declaration, it is sufficient." And in Hawke v. Bacon,<sup>3</sup> the court use this expression: "This case does not differ from the common case of pleading *liberum tenementum*, where, if the defendant proves that he has a single acre in the vill, the issue is with him, whatever quantity of land the plaintiff may have there." It cannot make any difference that the plaintiff in the present case gave his close a name in the declaration, for the defendant's close was known by the same name.

ABBOTT, C. J. I am clearly of opinion that the plaintiff was not

<sup>1</sup> 23 b, pl. 147.<sup>2</sup> 7 T. B. 335.<sup>3</sup> 2 Taunt. 156.

bound to new assign in this case. In order to compel him to do that, as a name was given to the close in the declaration, the defendant should have given some further description in his plea.

BAYLEY, J. According to the old form of pleading in trespass, the plaintiff did not name his close. Then the defendant gave some name to the close; and if the plaintiff did not new assign, the common bar applied. This is the rule laid down in *Dyer*;<sup>1</sup> afterwards it became usual for the plaintiff to name the close in the declaration, and then he may apply his evidence to any close of that name in his possession, and the defendant does not maintain a plea of *liberum tenementum* by showing that he is the owner of a close of that name. In order to avail himself of such a plea, he must set out the abutments.

HOLROYD, J. The plaintiff in trespass declares upon his possession; and it appears to me, that the question upon the issue was, whether the close, described in the declaration as the plaintiff's, was the defendant's freehold or not. Now there was evidence that a close of that name, in the plaintiff's possession, was not the freehold of the defendant, and he had no right to substitute another close as the subject-matter of the issue. In the old common bar, the defendant alone gave a name to the close, and then the issue was, whether that close was the defendant's freehold. In the rules of this court, made in 1654, § 12, it is said, "For the avoiding of the common bar and new assignment, the declaration upon an original *quare clausum fregit* may mention the place certainly, and so prevent the use and necessity of the common bar and new assignment;" and by § 16, "The common bar and new assignment is to be forborne where certainty is contained in the declaration equivalent to a new assignment." I mention these rules to show what was then considered sufficient certainty in a declaration to prevent the application of the common bar. In the present case, I think, the certainty was such as to prevent the defendant from availing himself of the common bar.

BEST, J., concurred.

*Rule refused.*<sup>2</sup>

<sup>1</sup> 28 b.

<sup>2</sup> *Lempriere v. Humphrey*, 8 A. & E. 181; *Cooke v. Jackson*, 9 D. & R. 495; *Lethbridge v. Winter*, 2 Bing. 49, *accord*. Conf. *Smith v. Royston*, 8 M. & W. 881; *Ellison v. Isles*, 11 A. & E. 665. — Ed.

here runs the Dept. Hence case wrong. If a party traverses a general pleading he runs the risk of proof of some specific point matter falling within general pleading.

Then Ct. would probably have allowed a new assignment.

The one who pleads affirmatively has<sup>a</sup> right to introduce any evidence that will support his plea.

Case followed in Eng. but following Cases contra:

14 Meil 465; 7 Hals. 357.

8 Wend 476; 6 Wath 516

39 N.H. 488.

liberum tenementum  
means "I have right to  
immediate possession."

Dec. that Defts. assaulted Ptf. forced him out of a field, in & through a pond & imprisoned him.

Plea: That Ptf. was in a close of Deft Powell & that Powell & other Defts. as his assistants expelled him from close since he would not go out when ~~seam~~ civilly requested.

Trng Deft' also pleaded Gen'l issue. Trng found for Ptf. on Gen'l issue & for Deft on special plea.

Jy Motord to enter v. for him on whole matter notwithstanding v. for Ptf. on gen'l issue, as the special plea answered the whole substance of Dec. & the dragging through pond & it was only aggravation of assault. Held that dragging through pond was a substantive cause of action in itself & hence not covered by special plea." & that to recover on it Ptf. did not need to new assign since Deft had pleaded Gen'l Issue.

BUSH v. PARKER, THOMAS AND JOHN POWELL, AND  
KEARSLAKE.

IN THE COMMON PLEAS, JUNE 8, 1834.

[*Reported in 1 Bingham's New Cases, 72.*]

TRESPASS for assaulting the plaintiff, seizing and laying hold of him, pulling and dragging him about, striking him many violent blows, forcing him out of a certain field into and through a pond, and there imprisoning him.

Second count for assault and imprisonment.

The defendants pleaded, first, not guilty; and then, as assistants of John Powell, justified the assaulting, seizing and laying hold of the plaintiff, and a little pulling and dragging him about, on the ground that the plaintiff was unlawfully in a close of John Powell's, and refused to go out when civilly requested.

The jury having found Parker and John Powell guilty on the general issue, with £5 damages, and having found a verdict for the defendants on the residue of the record, —

*Ludlow*, Serjt., moved to enter up judgment for Parker and Powell, notwithstanding the verdict against them on the general issue, on the ground that the dragging through the pond, which was not adverted to in the pleas of justification, was only matter of aggravation; the gist of the action being the assault and battery, which were covered by the pleas of justification. In *Taylor v. Cole*,<sup>1</sup> where the action was for entering the plaintiff's house and turning him out, Buller, J., said, "The first count is for breaking, entering, and expelling; the plea only justifies the breaking and entering, showing a good cause for it; and that is a full answer to the first count; for the breaking and entering are the gist of action, and the expulsion is only matter of aggravation. If the plaintiff had wished to take advantage of the expulsion, he should have shown the special matter in a new assignment." And *Dye v. Leatherdale*,<sup>2</sup> *Gates v. Bayley*,<sup>3</sup> and *Fisherwood v. Cannon*,<sup>4</sup> establish that position. In *Stammers v. Yearsley*,<sup>5</sup> the gist of the action was the disgrace incurred by the plaintiff in consequence of his being imprisoned on a charge of assault with intent to commit a felony; and it was rightly held, that a plea justifying the imprisonment on a charge of mere assault, was no answer to the action. Here the defendants were justified in forcing the plaintiff out of

<sup>1</sup> 8 T. R. 297.

<sup>2</sup> 8 Wils. 20.

<sup>3</sup> 2 Wils. 813.

<sup>4</sup> 8 T. R. 297.

<sup>5</sup> 10 Bingham. 85.

their employer's field by the nearest way; and whether that way led them through a pond or a hedge was immaterial. If it were material, the plaintiff should have new assigned. *Cheasley v. Barnes*.<sup>1</sup>

A rule *nisi* having been granted, —

*Wilde*, Serjt., showed cause.

The defendants having pleaded not guilty to the whole declaration, and having omitted to justify the dragging through the pond, it was unnecessary for the plaintiff to new assign; *Cheasley v. Barnes*, therefore, does not apply; and the dragging through the pond was parcel of the gist of the action. It was an act which the defendants could not avow without alleging and proving facts in justification, and no such facts appear on these pleadings. For though the defendants had a right to expel the plaintiff from their employer's field, and to use the force necessary for that purpose, they had no right, when he was out of the field, to proceed to corporal infliction. That infliction is a serious ground of action, independently of the expulsion. In *Taylor v. Cole*, the expulsion of the plaintiff was no ground of action, independently of the trespass by entering his house; for the only question to be decided there was, whether the lessee of a term might quietly enter. But in *Phillips v. Howgate*,<sup>2</sup> where, in trespass, the first count of the declaration stated that defendant assaulted and imprisoned plaintiff, and during such imprisonment, struck, pulled, and pushed him about; justification, that defendant arrested plaintiff under process of court; and that plaintiff, while in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c.; it was held that that latter part of the justification not being proved, the plaintiff was entitled to judgment; and that it was not necessary to new assign the battery by the defendant. It was held also, that the second count of the declaration (which omitted the battery), having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses as laid in the first count.

*Ludlow and Talfourd*, Serjts., *contra*.

In *Phillips v. Howgate*, the plea of justification was such as to preclude the plaintiff from a new assignment; for the defendant alleged in justification of his battery, an attack by the plaintiff which never took place. Here, if the dragging through the pond were a corporal infliction unnecessary for the defendant's purpose of extruding the plaintiff, he ought to have new assigned the extra violence. But for aught that appears to the contrary, the pond was parcel of the close,

<sup>1</sup> 10 East, 78.

<sup>2</sup> 5 B. & Ald. 220.

cf with Montfort v Smith. 235  
case right.

Then one trespass.

Then several trespasses.





and the only direction by which it might be possible to expel the plaintiff. He might have refused to mount a stile. The gist of the action was the expulsion from the field. The track by which the plaintiff was driven was immaterial. *Taylor v. Cole*, therefore, is in point. In 1 Wms. Saunders, 28, note 3, it is laid down, "If a plea begin only as an answer to part, and is in truth an answer to part, or though in law it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by *nil dicit*. But this rule must be understood with this limitation, that the part of the declaration which is not answered by the plea, is material, and the gist of the action; for, where any thing is inserted in the declaration as matter of aggravation, the plea need not answer or justify that; for the answering of that which is the gist of the action will cover the whole declaration." Accordingly, in *Montprivatt v. Smith*, where to trespass for breaking and entering a house, and staying therein three weeks, the defendant pleaded a justification as to breaking and entering, and staying in the house twenty-four hours, under a writ of *fi. fa.*, it was held that the plea covered the whole declaration.

And in *Lambert v. Hodgson*,<sup>1</sup> where the declaration was of two counts, for assault and imprisonment; plea, that defendant being bail for plaintiff, arrested him to render him in discharge, and detained him till he had satisfied the demand in the action; replication, *de injuria*. It appeared that defendant, in addition to detaining plaintiff till he satisfied the demand in the action, detained him an hour longer, till he paid the expenses of the defendant's becoming bail, &c. It was held, that there was one continuing trespass; and that, therefore, in order to recover for that part of it which was unjustifiable, namely, the additional detention for the bail expenses, the plaintiff ought to have newly assigned. *Dale v. Wood*<sup>2</sup> is to the same effect.

TINDAL, C. J. I agree in the rule of law as laid down by the counsel for the defendants, that where in trespass a defendant pleads a justification, going to the gist of the action, it is not necessary to include that which is mere matter of aggravation. But that brings us to the application of the rule, and to the inquiry whether it will serve the defendants or not. And we have only to look to the pleadings here, and to apply our common sense to the allegation that the defendants dragged the plaintiff through a pond, to see that it is a distinct and substantive trespass, and not part of the assault of which the plaintiff first complains. He alleges that the defendants assaulted, seized, and laid hold of him, pulled and dragged him about, struck him many violent blows, forced him out of a certain field, into and through a pond,

<sup>1</sup> 1 Bingham, 817.

<sup>2</sup> 7 B. M. 33.

and there imprisoned him. It does not appear where the pond was, whether in the field or not. However, waiving that, how much do the defendants justify? The assaulting, seizing, and laying hold of the plaintiff, and a little pulling and dragging him about; altogether omitting to notice the allegation in the declaration, that the plaintiff was forced through a pond. The question is, whether this was a separate and distinct trespass, or a mere aggravation of the original assault; and it is plain that this was one link in a chain of trespasses following each other, and not a mere aggravation of the first assault. If that assault were alone the gist of the action, and justifying the gist were to be considered a justification of all that followed, we might suppose a case in which, after the assault, the assailant might throw his adversary over a precipice and break his arm. Would that, which stands on such distinct grounds, be justified by any answer to the assault? From one assault to another it might proceed to a contest in which the life of a plaintiff might be at stake. In like manner, as the outrage in question is no part of the trespass included in the justification, and would have required a distinct statement of facts to justify it, it is not covered by the defendants' plea. The case relied on for them is *Taylor v. Cole*. There, the plaintiff declared in trespass against the defendant, for breaking and entering the plaintiff's house and expelling him therefrom; the defendant, in one plea, justified the entry under a writ of *fi. fa.*, and in another plea, the expulsion, under a sale of the plaintiff's leasehold interest in the premises by virtue of the *fi. fa.*; and the court held, that the breaking and entering were the gist of the action, and that the expulsion was only matter of aggravation. But I beg to call attention to the way in which that point was treated in the court of error; that court distinguishing as to the case in which expulsion might or might not be a substantive trespass.

Lord Loughborough says, "It is not necessary to consider in what cases expulsion may be a substantive trespass.<sup>1</sup> Undoubtedly to enter into a house, and to expel the possessor, may be distinct acts, and they may be also connected. But when the plaintiff charges them as parts of one trespass, as is the case in this declaration, and the defendant sets forth a justification to the principal act, the entry, it is just that the plaintiff should, either by replication or new assignment, state that he insists on the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to consider it only as matter of aggravation. The plaintiff complains that the defendant broke and entered his house and expelled him; the defendant shows a justification of the entry; if the expulsion makes him a trespasser *ab initio*, it takes away his justification, and therefore should be replied."<sup>2</sup>

<sup>1</sup> See *Meriton v. Coombes*, 9 C. B. 787. — Ed.

<sup>2</sup> 1 H. Bl. 561.

If it does not make him a  
trespasser ab initio it may be  
new assigned.



Here, the dragging through the pond is not a trespass existing at the same time, but succeeding those trespasses in the declaration, which the defendant justifies. It is one of a chain of trespasses, which is not justified by merely justifying that which preceded it. *Phillips v. Howgate* goes the full length of this proposition; and, although the converse of it, proves the principle. There, in trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff, and during such imprisonment, struck, pulled, and pushed him about: justification, that defendant arrested plaintiff under process of court, and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c. The defendant failed in proving that the plaintiff, while in custody, conducted himself so violently as to render it necessary the defendant should strike him to prevent his escape, and then said, "let me get out of my difficulty by saying it was a mere aggravation of the original trespass." But the court said, no. The circumstance of the defendant having put matter into his justification, of which no proof had been given, would not, of itself, vitiate the justification. But the proof given was not sufficient to justify the trespass in pushing and striking the plaintiff. In order to justify that, it was necessary to prove that part of the defendant's justification in which he stated that the plaintiff resisted when in custody. That not being done, the court thought the justification was not proved, and that the plaintiff would be entitled to a verdict. That case is in point; and, therefore, the present rule must be discharged.

PARK, J. I am of the same opinion. The whole point is, whether this is a distinct trespass or an aggravation of the first assault. It is clear that, upon the declaration, the charge of dragging through the pond is a distinct and substantive offence. And I think that, upon this record, it appears that the pond was not part of the field from which the plaintiff was expelled; for the declaration alleges that the defendants assaulted, seized, and laid hold of him, pulled and dragged him about, struck him many violent blows, forced him out of a certain field into and through a pond, and there imprisoned him. Having got the plaintiff out of the field, the defendants have shown no reason for getting him into the pond. That was a substantive trespass, for which the plaintiff is entitled to retain his verdict.

GASELEE, J. I am also of opinion that this was a substantive trespass, and is not covered by the plea. If, in such cases, we were to say that the whole is one transaction, and covered by a plea justifying a single assault, much would remain unanswered. Suppose a case of assault, and dragging the party assaulted, in handcuffs, through the streets to a place of confinement: could a defendant justify that by

pleading that he arrested the party for a debt? *Stammers v. Yearsley* is much like the present case. There, the plaintiff complained of assault and battery, of being taken in custody along the streets, and of being imprisoned on a charge of assault with intent to commit a felony: defendant pleaded, that plaintiff having assaulted him, defendant gave plaintiff in charge of a peace officer, who laid hands on him and took him before a justice. At the trial, although one assault only was proved, the facts pleaded were held to be an insufficient answer to the facts declared on.

Here, the declaration alleges, that the defendants assaulted, seized, and laid hold of the plaintiff, pulled and dragged him about, struck him many violent blows, forced him out of a certain field into and through a pond, and there imprisoned him. And it is impossible to consider that as merely an aggravation of the first trespass.

BOSANQUET, J. I am of the same opinion. The question is, whether this is part of the manner in which the trespass was committed, or, in itself, a separate trespass. The declaration states, that the defendants assaulted, seized, and laid hold of the plaintiff, pulled and dragged him about, struck him many violent blows, forced him out of a certain field into and through a pond, and there imprisoned him.

The defendants profess to justify the assault, battery, and pulling and dragging about; and then contend, because they have justified that, that the dragging through the pond is only part of the manner in which the trespass was committed. That is not a reasonable construction of the declaration. The defendants have pointed their justification to the battery only, leaving the affair of the pond unanswered; and, as that was also a substantive trespass, the plaintiff ought to retain his verdict. *Rule discharged.*<sup>1</sup>

*omit.*

NORMAN v. WESTCOMBE AND ANOTHER.<sup>2</sup>

IN THE EXCHEQUER, JANUARY 15, 1837.

[Reported in 6 *Law Journal Reports*, *Exchequer*, 164.]

TRESPASS for breaking and entering the plaintiff's house.

Pleas. First, not guilty; second, that one W. F., before the said time when, &c., held and enjoyed a certain dwelling-house of the defendant T. W., under a demise, at a yearly rent of £8, payable from

<sup>1</sup> *Lane v. Dixon*, 8 C. B. 776, *accord.* — Ed.

<sup>2</sup> This case was decided in Hilary Term, and is reported by W. G. Lumley, Esq.

Defendant.

Plea: Justification under search warrant.

Repli. N. A: Defendant at a different time.

Rej.: Same Justification.

Surrej: De Injuria.

Def. failed in proving facts of his Rej. but claimed that it was admitted by Repli.

Held that on a New Assignment the former pleadings are not admitted.



Had there been ordinary replica-  
tion Dept's argument would  
have been sound but as  
there was new Assignment  
here the former pleading  
was struck out.

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the said W. F. to the said defendant, and that just before the said time when, &c., a large sum, to wit, the sum of £8, for one year of the said demise, was owing from the said W. F. to the defendant; and while the same was in arrear, and within thirty days before the said time when, &c., the said W. F. fraudulently and clandestinely conveyed away and carried off and from the premises, so held and enjoyed by the said W. F., certain goods and chattels, to wit, &c., of the said W. F., to prevent the defendant from distraining the same for the rent so due, and for that purpose conveyed them to the said dwelling-house in which, &c., without leaving any goods and chattels on the said premises, sufficient to satisfy the said arrears of rent; that the defendant requested the plaintiff to allow him to enter his dwelling-house to seize and take the said goods, which he refused to do; that a warrant to search the said plaintiff's house was then obtained from two justices; and the defendants justified the entry, under that warrant, to search for the goods so clandestinely removed.

Replication. That the plaintiff declared for that the defendants broke and entered the said dwelling-house upon a different occasion, and upon another and different part of the day from that in the plea supposed, and stayed and continued therein for a long space of time, to wit, for six hours *modo et forma*, which said trespasses newly assigned are other and different trespasses. Verification.

To this new assignment the defendants pleaded the same defence as to the declaration, merely alleging that it was before the trespasses newly assigned; and the plaintiff replied *de injuria*.

At the trial before Williams, J., at the last Summer Assizes for Somersetshire, the defendants proved that W. Fuke had removed his goods to the plaintiff's house to avoid the distress, and that the defendant, who was the landlord of Fuke, had gone to the plaintiff's house to demand the goods on the 19th of April. He then entered with the plaintiff's license. On the 20th he came again with the other defendant Sayer, and left him there at eleven o'clock, in order to obtain a warrant. He returned at one o'clock, and, together with Sayer, who had been turned out of the house in the interval, entered under the warrant. No proof was given of the demise to Fuke, nor of the arrears, but it was contended that these facts were admitted on the pleadings; and the learned Judge directed a verdict for the defendants. In Michaelmas Term last, a rule had been obtained for a new trial, on the ground of a misdirection, against which —

*Urle* now showed cause. The facts stated in the defendants' plea to the new assignment had been admitted by the plaintiff on the record, and therefore did not require to be proved at the trial. The plea to the new assignment is to be referred in its construction to the plea to

the declaration; *House v. The Thames Commissioners*.<sup>1</sup> Although in the plea to the new assignment a demise and arrears are stated, yet they have been already stated in the plea to the declaration, and admitted by the plaintiff. It was enough for the defendant to apply those facts by parol evidence to the same premises and the same time, which was done. In all continuous pleadings, every thing not traversed is admitted, and the whole of the pleadings in the present case are continuous. The new assignment, therefore, admits the truth of the justification. 1 Wms. Saund. 299, a; *Oakley v. Davis*.<sup>2</sup> The case of collateral pleadings is different.

[PARKE, B. Under the issue on the new assignment, it must be proved that Fuke was tenant at the precise part of the day on which the plaintiff proves that the defendants entered.]

It is submitted, that that is done by the aid of the parol evidence.

[LORD ABINGER, C. B. You seek to help out the admission on the pleadings by parol evidence.]

[PARKE, B. Can you use parol evidence to apply the admission on the pleadings to the facts? You cannot call in aid an admission in one plea to prove another.]

No, that cannot be done where there are collateral pleadings; but it is different where they are continuous. This case may be illustrated by other analogies. Suppose a trespass *quare clausum fregit*, or an assault, and a right of way be pleaded to the former, and a justification to the latter; if there be a new assignment of *extra viam*, or excess, the justification in each case is admitted.

[LORD ABINGER, C. B. If there had been two counts in trespass, and the defendant had pleaded a justification to each, which had been admitted by the plaintiff as to one count, and traversed as to the other; the former plea would have been as though it were struck out of the record, and the trial would have been on the other. The question on the new assignment is the same.]

The two counts are as two actions, and it may be treated as collateral pleadings; but even then probably the admission in the one might be used in the other, provided there were a proper application by parol evidence. Again, take the case of an action on a bill of exchange, and for goods sold, for which the bill was given; and the defendant pleads to the count on the bill, payment, to which the plaintiff enters a *nolle prosequi*, and to the count for the goods a satisfaction by the bill; the defendant might show that the plaintiff has admitted the payment of the bill.

*Crowder and Ball*. The plaintiff does not, by the new assignment,

<sup>1</sup> 3 Brod. & Bing. 117.

<sup>2</sup> 16 East, 82.



on this point see Tompkins v. Ashby,  
p. 6.

admit the facts alleged in the plea. He avoids the discussion on the trespass, justified by the defendants; but he does not admit or deny it. He takes issue on all the facts alleged by the defendants, in answer to the trespass, of which he does not complain. In the case of the justification, under the right of way, the plaintiff, when he replies *extra viam*, necessarily admits the way; but there is no connection between the two entries. And this is not like the case of one assault, for which two actions are brought, in one of which the defendant succeeds, when undoubtedly the record in one action may be used in the other. Here, however, there is nothing more than an avoidance of the contest, and no admission.

LORD ABINGER, C. B. The ingenious argument for the defendants raised a considerable doubt in my mind. If this had been parallel to the cases suggested, of two separate counts, with an admission of certain facts in the pleadings to one, or of two separate actions, to one of which there was a plea admitted by the plaintiff, or the defendants had recovered a verdict thereon, I should have thought it worthy of consideration, whether the admission or verdict would not have been evidence in support of the pleadings to the other count or action. But those are distinguishable from the present case. A new assignment does not admit the facts stated in the plea, but is merely an assertion that the plaintiff does not investigate the subject-matter set forth in the plea. It is not an admission, but is the same as if the plaintiff were to say, "I do not choose, and never intended to go for that trespass, which you have attempted to justify." Suppose a plaintiff embraces several matters in his declaration, to one of which the defendant pleads a justification, which the plaintiff cannot deny, and he agrees to have it struck out of the declaration, and obtains an order for that purpose, and goes to trial on the other matters, that would be taken from the consideration of the Judge and jury, and would not be evidence in support of the other issues. Here the pleadings, previous to the new assignment, are to be taken as if they were in point of fact struck out of the record, and the defendants had no right to use them on the trial of the other issues.

PARKE, B. I entertained no doubt when this case was moved, but I have been led into a doubt by assuming that the new assignment admits the truth of the matter previously pleaded. But when we examine the nature of a new assignment, we find that it only admits the existence of another trespass, as to which the plaintiff wholly abandons all inquiry. Its effect, as Mr. Crowder says, is not an admission of the facts stated in the plea, but an assertion that that is not the cause of action of which the plaintiff complains. Then the other pleadings, previous to the new assignment, being out of the case, the defendants

cannot make use of any admission of the facts stated in the plea to the declaration.

BOLLAND, B., concurred.

*Rule absolute.*<sup>1</sup>

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FREEMAN v. CRAFTS.

IN THE EXCHEQUER, TRINITY TERM, 1838.

[Reported in 4 Meeson & Welsby, 4.]

DEBT in £10 for goods sold and delivered, in £10 for work and labor and materials, and in £10 on an account stated. Pleas, first, *nunquam indebitatus*; secondly, that the defendant paid to the plaintiff divers sums of money, amounting in the whole to a large sum of money, to wit, the amount of all the several alleged debts and moneys in the declaration mentioned, in full satisfaction and discharge of the said several debts and moneys, &c.; on which issue was taken. On the trial before the under-sheriff of Middlesex, the defendant proved payments to the plaintiff of sums exceeding the amount claimed in the declaration, and the jury found that £92 had been paid by the defendant to the plaintiff, but that the plaintiff had done work for the defendant to the amount of £107. A verdict was thereupon taken for the plaintiff for the balance of £15, leave being reserved to the defendant to move to enter a verdict for him, if the Court should be of opinion that the plaintiff was not entitled to recover without a new assignment.

*Corrie* now moved accordingly. The plea was supported by proof of any sum paid, to the amount claimed in the declaration, and if the action was brought for other sums than those so paid, the plaintiff ought to have new assigned: otherwise how is the defendant to get the costs of the plea of payment? It is to be assumed that the defendant has answered what the plaintiff charges against him. In *Collins v. Aron*,<sup>2</sup> it seems to be implied in the judgment of Tindal, C. J. that the proper course to have pursued in such a case as this, would have been to apply to increase the damages laid in the declaration, or else to new assign. The declaration here is quite general.

LORD ABINGER, C. B. So is the plea; it means that the defendant has paid the sums the plaintiff goes for, or it means nothing. To make

<sup>1</sup> *Dand v. Kingscote*, 6 M. & W. 197, per Parke, B.; *Robertson v. Gantlett*, 16 M. & W. 289; *Grove v. Withers*, 4 Ex. 875; *Branker v. Molyneux*, 1 M. & G. 710; *Wilmshurst v. Bowker*, 5 B. N. C. 550, *accord*. See *Aldred v. Constable*, 6 Q. B. 876-7; per Pattison, J.; *Bartlett v. Prescott*, 41 N. H. 449. — Ed.

<sup>2</sup> 4 Bing. N. C. 238.

Debt. in 30 £

Plea: payment.

Jury found that Deft. owed  
Pltf. 107 £ & had paid him 92 £.  
V. for Pltf. for 15 £.

On motion to enter a V. for Deft.  
Held that the plea of payment  
must be construed as to  
the declaration & means payment  
of ams. then claimed. Hence  
it was unnecessary for  
Pltf. to reassign.

J. on V.

Can wrong. Just like  
Crocker v. Crompton.

Pltf. ought to have declared  
for full amount.

Declaration is too general.  
Now generally Pltf. must



make out a bill of particulars.

Debt for work & labor 72 £ in 4c 73 £.  
Plea that the debt arose on a con-  
tract which Deft. has fully  
paid.

Repli: ~~Traverse~~ Denying Plea.

Rej: Traverse of Issue.

On trial Plff. proved sum due  
for extra work which Deft had  
not paid for.

Held on a motion to enter J.  
~~ver~~ for Deft that there sum  
due for extra work could  
not be gone into under the  
pleadings. The Declar. is  
general but the plea is spe-  
cific & if it did not hit  
the declaration the Plff. should  
have new assigned. Instead  
he joined ~~issue~~ traversed

the plea a good defence, it must be interpreted to apply to a payment of the money the plaintiff seeks to recover; it is no answer, unless it means that the plaintiff can prove no sum which the defendant has not paid.

ALDERSON, B. It is like the plea of license in trespass, where the defendant must prove a license for every trespass the plaintiff can prove. So, in a plea of payment, you undertake to prove that whatever demand the plaintiff can establish, you have paid him. No new assignment was therefore necessary.

*Per Curiam.*

*Rule refused*<sup>1</sup>

*omit.*

### ROGERS v. CUSTANCE.

IN THE QUEEN'S BENCH, JANUARY 12, 1841.

[Reported in 1 *Queen's Bench Reports*, 77.]

DEBT for £73 for work, labor, and materials, and £73 on an account stated.

Pleas. 1. Except as to £23, parcel, &c. (which was paid into court), *nunquam indebitatus*. Issue thereon. 2. Except as before, that the work, labor, and materials in the first count mentioned (except as to the £23), were done and provided by plaintiff, by reason and as in pursuance of a contract between plaintiff and defendant, whereby plaintiff agreed to lay and construct for defendant the permanent way at a certain place, viz., &c., of a certain railway, viz., the Croydon railway, in manner then agreed upon between plaintiff and defendant, at a certain price, viz., of 6s. 6d. per yard, &c. And that, after the said contract had been so made, and before the commencement of this suit, viz. on &c., plaintiff claimed to have laid and constructed the said permanent way as in pursuance of and according to the said contract; and thereupon afterwards, viz., &c., a controversy arose between plaintiff and defendant, touching the said supposed execution of the said contract, defendant alleging that the said permanent way had not been nor was laid and constructed in the manner in which it ought to have been according to the said contract, but in an inferior, &c., and plaintiff alleging the contrary; and thereupon, afterwards and before the commencement of this suit, viz. on &c., for putting an end to the said controversy, it was agreed between plaintiff and defendant that defendant should take to and accept the laying and construction by plaintiff of the said permanent way, as

<sup>1</sup> *James v. Lingham*, 5 B. N. C. 558; *Alston v. Mills*, 9 A. & E. 248; *Hill v. White*, 6 B. N. C. 26; *Kennington v. Alison*, 2 Dowl. N. S. 658, *accord.* — ED.

then laid or constructed, at a certain price lower than the contract price aforesaid, viz. the price of 5s. a yard of the said permanent way so laid &c. by plaintiff, in satisfaction and discharge of the said contract, and should become debtor to plaintiff at the rate or price last aforesaid; and that payment by defendant to plaintiff at that rate or price should be taken as and for and in full satisfaction, &c., of all claims, &c., of plaintiff on defendant for work, labor, and materials done or provided by plaintiff, as in pursuance of or by reason of the said contract, &c. Averment that, by virtue of and under the last mentioned agreement, defendant, before the commencement of this suit, viz., on, &c., became and was indebted to plaintiff in the said sum of money in the first count mentioned (except the said sum of £23, parcel, &c.), to be paid by defendant to plaintiff on request, for work, labor, and materials, as in the said first count in that behalf mentioned. And that afterwards and before the commencement of this suit, viz., on &c., defendant, in pursuance of the agreement in this plea last aforesaid, paid to plaintiff, and plaintiff then accepted and received from defendant, divers sums, &c., amounting to the said sum in the first count mentioned (except the said sum of £23, parcel &c.), in full satisfaction and discharge of the said sum in that count mentioned (except &c., parcel &c.). Verification.

3. As to the £23, payment into court, which plaintiff accepted.

Replication to plea 2. The defendant did not pay to plaintiff, nor did plaintiff accept or receive from defendant, the said supposed sums of money in the said second plea in that behalf mentioned, amounting to the money in the first count mentioned except the said sum of £23, or any part thereof, in full satisfaction and discharge of the said money in the first count mentioned except the said sum of £23. Issue thereon.

The plaintiff delivered particulars of demand, containing two sets of items, the one set for "Contract work" in laying the way at 5s. per yard, and for ballasting, and drains; the other set for "Extra work" at 3s. 6d. per day; the whole amounting to £276. The particulars gave credit for "Cash on account," leaving an alleged balance of £72 in plaintiff's favor.

On the trial, before Lord Denman, C. J., at the sittings in London after Hilary term, 1889, it appeared that payments had been made and accepted in respect of work &c., which formed the subject of the latter agreement mentioned in plea 2, and that, after these were balanced, £72 was still claimed by the plaintiff, of which sum the £23 paid into court under the third plea was part. The plaintiff's counsel proposed to give evidence of extra work: the defendant's counsel objected; but the evidence was received; and the plaintiff had a verdict for £49, leave being given to move to enter a verdict for the defendant on the second issue. In Easter term, 1889, —

the plea then admitting that  
it presented the point in  
ambiguity.

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Here plea is specific.  
This is practical reason  
for making Pltf. new  
assign.



Sir *F. Pollock* moved accordingly, on the ground that no demand for extra work could be gone into at the trial, the second plea having stated and answered a claim by contract only, and the plaintiff having taken issue on the discharge of that claim. In Michaelmas term, 1840,<sup>1</sup> —

*E. James* showed cause. The plea was no answer as to the £72, though true as to the residue. The defendant was informed by the particulars of demand that more than the contract work was in question. The statement in his second plea, as to a substituted contract, is wholly immaterial; the defence, in substance, is the ordinary one of payment and acceptance in satisfaction. The averments as to a new contract, being immaterial, are not admitted by the replication; *Bennion v. Davison*;<sup>2</sup> and, if they were, the admission that the debt in question accrued under that contract would amount merely to a waiver of proof as to the manner in which it accrued, but would not afford ground for assuming, without proof, that the payments were made exclusively in respect of the agreement stated in the introductory part of the plea; *Bennion v. Davison*; *Edmunds v. Groves*.<sup>3</sup> The plaintiff, in a case like this, is not called upon to new assign; *Freeman v. Crafts*; *James v. Lingham*.<sup>4</sup>

Sir *F. Pollock* and *G. S. Wilson*, contra. It is true that, where the declaration and plea of payment are both general, the defendant is bound to apply his evidence to that claim which the plaintiff actually relies upon at the trial. But here that consequence which has arisen in other cases from the generality of the declaration is guarded against by the plea; for the defendant, after stating the original and the substituted contract, expressly says that the defendant, "in pursuance of the agreement in this plea last aforesaid, paid" to plaintiff, and plaintiff accepted and received from defendant, divers sums, amounting to the sum in the first count mentioned, except £23, &c. And the plaintiff, by simply traversing the payment and acceptance, assents to the limitation which the plea puts upon his demand. This distinguishes the present case from *Freeman v. Crafts* and *James v. Lingham*.<sup>4</sup> The plaintiff, by his replication, admits that the defendant has taken his claim in the right sense. If he meant to insist on a demand not within the agreement lastly mentioned in his second plea, he ought to have new assigned.

*Cur. adv. vult.*

LORD DENMAN, C. J., now delivered the judgment of the court.

<sup>1</sup> November 19th. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, JJ.

<sup>2</sup> 8 M. & W. 179.

<sup>3</sup> 2 M. & W. 642.

<sup>4</sup> 5 New Ca. 558. See *Ferguson v. Mahon*, 9 A. & E. 245; *Alston v. Mills*, 9 A. & E. 248.

This was an application to enter a verdict for the defendant. The declaration was for work and labor. The second plea, upon which the point turns, was pleaded to the whole demand in the first count (except as to £23, on which nothing turns), and stated that the work and labor there mentioned, except, &c., were provided in pursuance of an express contract, whereby plaintiff had agreed to lay a permanent way for defendant at a certain price per yard; that plaintiff claimed to have performed his contract; on which a controversy had arisen, the defendant contending that the work was not properly done; that a second agreement was then entered into, by which plaintiff was to accept a lower price in full satisfaction; and so defendant became indebted in the sum mentioned in the first count, except as aforesaid; concluding with averments of payment and acceptance of that sum in pursuance of the said agreement.

The replication traversed the payment and acceptance of the money in the second plea mentioned in discharge of the said money in the said first count mentioned. The particulars of demand stated the action to be brought to recover a certain sum for the laying a permanent way, and another sum for extra work. Upon the trial the defendant proved payment of every thing due under the second agreement, and acceptance of that sum on that account; but the plaintiff contended that the action was brought to recover for the extra work; and, that demand having been proved to the amount of £49 without any answer, a verdict was taken, with leave to move to enter it for the defendant.

And we are of opinion that the rule granted for that purpose should be made absolute. Where the declaration and the plea are both general, and the plaintiff, by his particulars, points his demand to a particular balance of accounts between the parties, there the defendant will not be entitled to the verdict merely because he proves payment of a sum equal to the demand proved; for, in the first place, the issue is on the payment having been made and received in satisfaction of the demand in the declaration; and, secondly, there is no reason in justice why, to such a plea, the plaintiff should be called on to new assign under the circumstances stated; because, in fact, both parties are fully apprised of that which they came to try, and the defendant's proof is, indeed, a mere trick upon the plaintiff. This was the case of *James v. Lingham*,<sup>1</sup> which was cited for the plaintiff, and with which we entirely agree.

But the present case is essentially distinguishable. The declaration is general; but the plea narrows it, states the demand to be for the





Debt for 10 £ for work + labor wages  
of Plef. while in Service of Deft.  
Plea that it was agreed that if  
Plef. became drunk he should  
forfeit his wages up to that time.  
Repli. that Deft agreed to waive  
forfeiture.  
New assign. that 7 £ part of 10 £  
was for services after he was  
drunk.

Drummond  
Held that the Repli. is not bad  
for duplicity. The first part  
answers the plea as to wages  
for work done before the  
forfeiture & the new assign.

work done under the contract, and shows that that has been satisfied. If, as the plaintiff now contends, the plea was wrong in so pointing the declaration, and the action was really brought for the extra work, this was exactly the case in which the plaintiff should have new assigned; for the ambiguity did not arise merely on the proof at the trial; but the plea, on the face of it, showed that it had not hit the declaration. By taking issue on the payment and acceptance, limited as the plea had limited it, in respect of the account on which paid and received, the plaintiff accepted the narrowed issue, and would have misled the defendant if he could be at liberty at the trial to go for the extra work.

Reliance was placed on the particulars of demand: but they specified both heads of demand as insisted on in the action, and therefore leave the argument untouched. But even if they had been confined to the extra work, yet as they would then have been inconsistent with the plea, they could not have prevailed to make that the issue between the parties, which the plea and replication unequivocally showed not to be the issue.

We are of opinion, therefore, that this rule must be absolute to enter the verdict for the defendant.

*Rule absolute*

*omit*

MONKMAN v. SHEPHERDSON.

IN THE KING'S BENCH, JANUARY 15, 1840.

[Reported in 11 *Adolphus & Ellis*, 411.]

INDEBITATUS debt for £10, for wages of plaintiff for his service as hired servant of defendant.

Plea: that when plaintiff was hired by defendant, it was agreed between them that, in case plaintiff should at any time during his service voluntarily become drunk, he should forfeit all wages then due, and defendant should cease to be liable for the same or any part thereof; that plaintiff served defendant on those terms; that afterwards, and after the money mentioned in the declaration became due, and whilst plaintiff was in the service of defendant, and before action brought, plaintiff became and was drunk, whereby he forfeited the wages in the declaration mentioned, and defendant ceased to be liable for the same, or any part thereof. Verification.

Replication: that, after plaintiff so became and was drunk, defendant, well knowing that plaintiff had been drunk, exonerated and discharged him from so being drunk, and from all forfeitures

incurred by him, and which had accrued to defendant in respect thereof, and then agreed to pay to plaintiff the wages already due to him as such hired servant as aforesaid, and then continued to employ him as such servant as aforesaid. Verification.

New assignment, alleging that only a part, to wit, £3, parcel, &c., accrued to plaintiff as wages before he so became drunk, and that the residue, to wit, £7, accrued to plaintiff for wages as aforesaid after he so became drunk, and after defendant had notice thereof as aforesaid; and that plaintiff declared not only for wages due before, but also for wages due after, he so became drunk, and after notice thereof to defendant. Verification.

Demurrer, showing for causes, 1. As to the replication, that it stated no consideration for exonerating plaintiff from the forfeitures, &c., or for agreeing to pay the wages; and that it tended to raise an immaterial issue, viz., the continued employment of plaintiff as servant;<sup>1</sup> 2. That the replication and new assignment were double, for that the former, if true, was an answer to the plea, and the latter was also an answer to part of the plea. Joinder.

The case was argued at the sittings in banc after Hilary Term, 1839.<sup>2</sup>

*Martin*, for the defendant. Then the new assignment and replication together are double, for the plea covers the whole declaration, and the replication answers the whole plea, yet the plaintiff goes on to give a further answer as to part of the sum demanded; so that he gives a double answer to the plea.

*Wightman*, contra. As to the new assignment, the declaration is general, and the plea *prima facie* covers the whole; so that the defendant would, on proving his plea to any part of the wages, be entitled to a general verdict, unless the plaintiff took care to new assign so as to recover wages due for service since the cause of forfeiture. *Vivian v. Jenkin*<sup>3</sup> shows that the plaintiff may subdivide his demand in the replication in answer to a plea that in terms covers the whole declaration. The same form of pleading was adopted in *Solly v. Neish*.<sup>4</sup>

*Martin*, in reply. *Vivian v. Jenkin* is an authority only to show that the plaintiff might have replied as to £3, parcel, &c., a forfeiture; and as to the rest, that it became due after the forfeiture. The plaintiff, if he proves his replication, and it be good in law, will recover all that he demands, though the new assignment should be struck out of the record.

*Cur. adv. vult.*

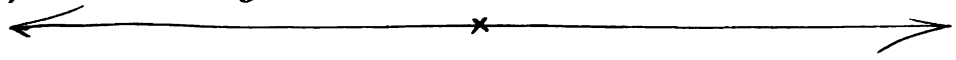
<sup>1</sup> The court held the replication bad for the reason above alleged. The arguments and opinions in relation thereto are omitted. — Ed.

<sup>2</sup> February 5th, before Lord Denman, C.J., Littledale, Williams, and Coleridge, JJ.

<sup>3</sup> 8 A. & E. 741.

<sup>4</sup> 2 C., M. & R. 355; s. c. 5 Tyr. 625.

ment shows that that was  
not the only claim. & set  
up the further claim.



base entirely sound.

Declar. was divisible and  
general.

New plea hit part & minor  
part.

Like case of

Freeman v Lawrence.

Declar. for entering & staying for  
days:

Plea. Leave & Licence.

Repli. No licence & new assign-  
ment that he stayed longer  
than he had licence for.

Decurres for duplicity & Multifariousness.

Held that Replication is good  
The trespass was divisible &  
Plff. could deny licence as  
to part of time & new assign-  
for remainder.

LOED DENMAN, C. J., now delivered the judgment of the court.

Besides the replication, the plaintiff has also now assigned that only part of the moneys in the declaration mentioned accrued due for services done before the intoxication alleged in the pleas, and that he sued, and has declared, as well for the money due for services after, as before, the intoxication. To this the defendant has demurred specially for duplicity, but it appears to us without any sufficient grounds. The declaration is general in form; and under it the plaintiff would have been entitled to give in evidence any demand for wages accruing due before the commencement of the suit. The plea treats the demand as entire, but assumes the action to be brought only for wages which had accrued due before the intoxication; the replication answers the whole plea by the agreement which we have just been considering, and it was necessary that it should do so. The plea could not be divided, for that is confined to whatever was due before the intoxication, and the answer is co-extensive with the excuse, and no more. If, therefore, the plaintiff had intended to sue only for the wages accruing after the intoxication, the plea would not have hit at all, and no replication at all would have been necessary. A new assignment alone would have been the plaintiff's proper course. But, as the plaintiff intended to sue both for the wages accruing due before, and those accruing due after, and the plea answers the former only, treating that as the only demand, the plaintiff might give such reply as he could to sustain the former part of his demand, and was also at liberty to new assign and point his declaration as to the latter. In this there is no duplicity either in form or substance; and the supposition that there is any arises from neglecting to observe that in truth the plea did not answer the whole extent of the declaration, that is, every thing which might be given in evidence under it. This part of the demurrer, therefore, fails; but as it was divisible,<sup>1</sup> the judgment will be for the defendant as to the replication, and for the plaintiff as to the new assignment.

*Judgment for defendant on the replication; for plaintiff on the new assignment.<sup>2</sup>*

*omit.*

LOWETH v. SMITH AND ANOTHER.

IN THE EXCHEQUER, FEBRUARY 10, 1844.

[Reported in 12 Meeson & Welsby, 582.]

TRESPASS. The declaration stated, that the defendants, on the 20th of June, 1843, with force and arms, &c., broke and entered a certain

<sup>1</sup> See 11 A. & E. 412, note (a). <sup>2</sup> Page v. Hatchett, 8 Q. B. 187, accord. — Ed.

dwelling-house and brick-yard of the plaintiff, situate, &c., and then made a great noise and disturbance therein, and stayed and continued therein making such noise and disturbance for a long time, to wit, for the space of four days then next following. It then went on to allege other trespasses, by seizing goods, &c.

Third plea, as to the breaking and entering the said dwelling-house and brick-yard, and staying and continuing therein, as in the declaration mentioned, a justification, by the leave and license of the plaintiff, to take possession of certain goods and effects.

Replication, traversing such alleged leave and license; and new assignment, that the plaintiff issued his writ, and declared thereon, not only for the breaking and entering the said dwelling-house and brick-yard, and staying and continuing therein, as in the introductory part of the said third plea mentioned, and in the said plea attempted to be justified; but also for that the defendants, with force and arms, and without the authority, and against the leave and license of the plaintiff, to wit, at the said times in the said declaration in this behalf mentioned, stayed and continued in and upon the said dwelling-house and brick-yard, making such noise and disturbance as in the said declaration mentioned, for a long time, to wit, for the space of three days next after the said day in the declaration mentioned, for other and different purposes than those in the said third plea mentioned, and also for a much longer time, to wit, the space of three days longer, than was necessary for the purpose of taking possession of the said goods, chattels, and effects in the said third plea mentioned, which trespasses, so newly assigned, are other and different trespasses, &c.

Special demurrer, for duplicity and multifariousness, and for departure from the declaration. Joinder in demurrer.

*Cole*, in support of the demurrer. The declaration complains of only one continued trespass to the dwelling-house and brick-yard, not of divers trespasses on divers days. The third plea justifies the trespass so alleged. The plaintiff might either have replied, traversing the plea, or new assigned; but he was not entitled to do both. *Taylor v. Smith*, *Cheasley v. Barnes*,<sup>1</sup> *Thomas v. Marsh*,<sup>2</sup> *Giaborne v. Wyatt*,<sup>3</sup> *Franks v. Morris*.<sup>4</sup> [PABKE, B. The plaintiff may traverse a right of way across the close mentioned in the declaration, and also new assign *extra viam*. That seems to be an authority against you. Though this is only one trespass, it is one occupying some time, and which is, therefore, divisible.] There can be no trespass which does not occupy some time. In trespass for false imprisonment, and a justification

<sup>1</sup> 10 East, 78.

<sup>2</sup> 8 Dowl. P. C. 505.

<sup>3</sup> 5 C. & P. 593.

<sup>4</sup> 10 East, 81, n.







under a *ca. sa.*, could the plaintiff traverse the writ, and also new assign that the defendant kept him an unreasonable time in custody? So in an action for expelling the plaintiff, and keeping him so expelled for a long time, which is all one trespass; could the plaintiff deny the right to expel him, and also new assign that the defendant kept him out longer than he ought to have done? [PARKE, B. Most probably the justification of the expulsion would cover the whole time.] The trespass charged in *Cheasley v. Barnes* was one which occupied a considerable time, and was laid to have been committed *diversis diebus*, which makes the case a still stronger authority. There the defendants pleaded, to a count for breaking and entering the plaintiff's close and seizing manure, and detaining it, until afterwards, on the same day, and on divers other days, they took it away from the close, a justification under a *fi. fa.* against a third person; to which the plaintiff replied, admitting the judgment and writ, *de injuria absque residuo causæ*, and also new assigned that the defendants broke and entered the close after the return of the writ; and this was held bad for duplicity. Suppose the defendants here had only pleaded not guilty, could the plaintiff have proved several distinct trespasses? [PARKE, B. No; but he could have proved that the defendant entered and stayed four days; that he threw the goods out at the end of the first day, and stayed three days longer. The question is, whether a trespass by continuation in point of time is not equally severable as the traversing over a continuous space of a close. The only limitation is, that the plaintiff cannot make that, which is one cause of action in the declaration, into two in the replication. ALDERSON, B. The declaration says, the defendants entered and stayed four days; the defendant sets up a justification, which entitled him to enter and stay for two days; to which the plaintiff replies, I deny you had any right to enter at all; but if you had, your only right was to stay two days, and you stayed two days longer without any color of authority.] If the continuing in possession amounts to a new trespass, *Cheasley v. Barnes* appears to be a direct authority.

*Hayes*, contra, was stopped by the court.

PARKE, B. The case of *Cheasley v. Barnes* proceeds upon this, that there the plaintiff in his replication alleged a fresh breaking and entering, one only being alleged in the declaration. But staying and continuing in a house appears to be a divisible trespass in point of time; there is a fresh trespass on each day; then the plea *prima facie* is an answer as to the whole. The plaintiff then says, as to part of the time, the defendants had no such authority as they allege; as to the rest, they had no justification even by the license they set up. It seems to

be as divisible as a trespass is in point of space, on different parts of the surface of a close.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

*Judgment for the plaintiff.*<sup>1</sup>

*misd.*

### HUDDART v. RIGBY.

IN THE EXCHEQUER CHAMBER, NOVEMBER 30, 1869.

[Reported in 5 Law Reports, Queen's Bench, 189.]

APPEAL from the decision of the Court of Queen's Bench refusing a rule for a new trial moved on the ground of misdirection.

Declaration, that the defendant broke and entered certain land of the plaintiff called the Moor Croft, otherwise the Maiden Croft, situate at Ribbleson, in the county of Lancaster, abutting, on the northerly side thereof, in part upon land of Richard Holden, and on the easterly side thereof in part upon land of Sir T. G. Hesketh, Bart., and in other part upon land used as a public cemetery by and belonging to the burial board of the borough of Preston, and broke open, damaged, broke to pieces, and destroyed the plaintiff's gates, hedges, and fences standing and being upon the land of the plaintiff, and destroyed the grass and other herbage there growing.

Plea, that at the time of the alleged trespass there was, and of right ought to have been, a common and public footpath over the land of the plaintiff for all persons to go and return on foot at all times of the year at their free will and pleasure; and the defendant, having occasion to use the way, then entered into and upon the land of the plaintiff, and along the footpath, then using the same, as he lawfully might, for the cause aforesaid, and because the gates, hedges, and fences had been erected, and then were wrongfully in and across the highway, and obstructing the same, and preventing the convenient use thereof, the defendant necessarily pulled down and destroyed the gates, hedges, and fences for the purpose of using the footpath, doing no unnecessary damage in that behalf, which are the alleged trespasses.

Joinder of issue.

At the trial before Hannen, J., at the summer assizes, 1868, held at Lancaster, the defendant's counsel proposed to give evidence of a common public footpath running east and west over the land of the plaintiff in the declaration mentioned. The plaintiff's counsel admitted such

<sup>1</sup> *Worth v. Terington*, 18 M. & W. 781; *Adams v. Andrews*, 15 Q. B. 294-5 (*semble*); *Cheeswell v. Chapman*, 42 N. H. 47, *accord*. — *Ed.*

Declar.: Trespass quare Clausum ~~per~~ <sup>per</sup> fit.

Plea: Right of profit. & necessary way.

Repli: Traversed of Issue.

Pltf. introduced Evidence that trespasses were committed wholly unconnected with the profit. Held that this was inadmissible under pleadings. Pltf. should have new assigned. The Plea was a complete defence. The making of gates alleged in Dec. was not a substantiation of fence ~~by~~ by itself, nor does the statement that there were gates in way describe it so as to prevent new assignment.



common public footpath, but offered to prove that the trespasses complained of were committed elsewhere.

The plaintiff's counsel offered to prove that there were no gates, hedges, or fences erected upon or across the admitted footpath, or obstructing the same, or preventing the convenient use thereof, but that there were such gates, hedges, and fences on the plaintiff's land across the track by which the defendant so passed, and that some of such gates, hedges, or fences were pulled down by the defendant.

Upon the admission that a common public footway did exist over the land, the learned judge ruled that the defendant, without further evidence, was entitled to a verdict, and he accordingly directed the jury to find, and the jury did accordingly find, a verdict for the defendant.

The plaintiff applied to the Court of Queen's Bench for a rule for a new trial, on the ground that the learned judge misdirected the jury.

The court refused a rule, on the ground that, the plaintiff not having new assigned, the evidence was not admissible, holding that the case was governed by *Glover v. Dixon*;<sup>1</sup> but the court gave the plaintiff leave to appeal.

*Gorst*, for the plaintiff (*Holker*, Q. C., with him). A new assignment is not necessary. The declaration sets out the close by abuttals, and contains an averment that the defendant destroyed the gates on the close: this is not mere aggravation, but a substantive averment. The defendant has treated it as a substantial matter, for he has pleaded a justification to the right of way, and also to breaking the gates. The replication traverses the whole plea. The right of way on these pleadings is identified as one having gates on it, and the plea could not be proved by showing that there is another right of way without gates. A new assignment is only necessary when there are two trespasses, or when, from the generality of the declaration, the defendant has mistaken the cause of action, which is not the case here. In *Bush v. Parker* the declaration was for assaulting the plaintiff, and dragging him through a pond, and it was held that the dragging through the pond was a substantive trespass. In *Lane v. Dixon*,<sup>2</sup> trespass was brought for breaking into a room and removing a brass plate. The removal of the brass plate was held to be, not mere aggravation, but a substantive offence. So, again, in *Phillips v. Howgate*,<sup>3</sup> where the defendant pleaded a justification to breaking and entering the dwelling-house of the plaintiff and assaulting him, and only proved a justification to entering the dwelling-house, the court held that the plea was not proved. So, in *Noden v. Johnson*,<sup>4</sup> the same doctrine was laid

<sup>1</sup> 9 Ex. 158; 28 L. J. (Ex.) 12.

<sup>2</sup> 8 C. B. 776.

<sup>3</sup> 5 B. & A. 220.

<sup>4</sup> 16 Q. B. 218; 20 L. J. (Q. B.) 95.

down. These cases show that the breaking of the gates is substantial matter, and the defendant, having pleaded a right to do these acts, cannot show that they were done on another and different right of way elsewhere; a new assignment is therefore unnecessary. Before the Common Law Procedure Act of 1852, the plaintiff could not have replied *de injuria*; but since that Act, under § 79, he may put in issue every thing stated in the plea. *Glover v. Dixon*<sup>1</sup> is distinguishable, for the declaration did not set out the close by abuttals. *Bracegirdle v. Peacock*<sup>2</sup> shows that even before the Common Law Procedure Act of 1852, the plaintiff might have replied that the gates were not standing in the way. In *Ellison v. Isles*<sup>3</sup> the plaintiff was compelled to new assign because the way had not been identified in the pleadings. In *Bond v. Downton*<sup>4</sup> the plaintiff sued in trespass for seizing his pigs. The plea stated that defendant was possessed of a close in which the pigs were eating, and were taken damage-feasant. The replication stated that the defendant was not possessed of the close in which the pigs were alleged to have been eating. It was ruled that the trespass to the close having been identified, the defendant was bound to show that he was possessed of a close in which the pigs were eating. The plaintiff could only have new assigned under § 87 of the Common Law Procedure Act of 1852, and would have had to state that he proceeded for causes of action different from all those which the pleas professed to justify. The plea having justified the whole declaration, and there being no other right of way with gates on it, the new assignment would be untrue, and would not be allowed under that section.

*Quain*, Q. C. (*Kemplay* with him), for the defendant. The judgment of the Court of Queen's Bench is correct. Before the Common Law Procedure Act of 1852, the matter was concluded. The only question is, whether the joinder of issue in the form given in that Act makes any difference. It is said that the declaration, having alleged that there are gates in the close, identifies the close; but it no more identifies the close than if it had been alleged that there was grass in it. If to this declaration the defendant had pleaded not guilty, and the plaintiff had proved a trespass to the close, he would be entitled to a verdict, although there were no gates or fences there. The gist of every action, *quare clausum fregit*, is the entry on the land. *Webber v. Sparkes*<sup>5</sup> is precisely in point. Lord Abinger, C. B., there says, "The mention of posts and rails on the close does not fix the locality of the trespass; if it did, the defendant would be entitled to a verdict on not guilty;" and Parke, B., says, "The plaintiff might have trav-

<sup>1</sup> 9 Ex. 158; 28 L. J. (Ex.) 12.

<sup>2</sup> 8 Q. B. 174.

<sup>3</sup> 11 Ad. & E. 665.

<sup>4</sup> 2 Ad. & E. 28.

<sup>5</sup> 10 M. & W. 485-487.







ersed and new assigned; then the question on the first issue would only have been whether there was a right of way across the close at all; if there was, and the defendants beat down the posts and rails, they would be liable on the new assignment. The new assignment does not amount to an admission of the facts stated in the plea; *Norman v. Wescombe*, *Robertson v. Gantlett*.<sup>1</sup> It was expressly decided in *Glover v. Dixon*,<sup>2</sup> that the joinder of issue given by the Common Law Procedure Act of 1852, put in issue those facts only which the plaintiff could have traversed before the Act, and all matters which must have been pleaded by way of new assignment must still be pleaded. In *Bracegirdle v. Peacock*,<sup>3</sup> and *Ellison v. Isles*,<sup>4</sup> the plaintiff had new assigned. The allegation as to breaking the gates is merely aggravation; *Taylor v. Cole*,<sup>5</sup> *Pratt v. Pratt*,<sup>6</sup> *Pritchard v. Long*.<sup>7</sup> The cases cited on the other side on this point do not apply, for the trespass was not in respect of land. In *Smith's L. C.*, 5th ed., p. 123, it is stated in a note to *Taylor v. Cole*, that the reporter of *Monprivatt v. Smith*, in a note to that case, cites *Taylor v. Cole*, *Dye v. Leatherdale*,<sup>8</sup> *Fisherwood v. Cannon*,<sup>9</sup> *Gates v. Bayley*,<sup>10</sup> and deduces from them a general principle, that, "where the defendant answers what may reasonably be considered the gist of the trespass described in the declaration, it will be presumed that the action is carried on only for that which the defendant has thus attempted to justify, unless the plaintiff intimates by a new assignment that the defendant has overlooked a part of the grievances he complains of, or has altogether misapprehended his meaning." Here the gist of the trespass is the entry on the land, and the plaintiff ought to new assign.

*Holker*, Q. C., was heard in reply.

KELLY, C. B. In this case we are of opinion that the judgment of the Court of Queen's Bench should be affirmed.

My Brother Willes<sup>11</sup> entertains some doubt on the case, and but for the high authority of Parke, B., and the decisions of *Glover v. Dixon*,<sup>12</sup> and *Webber v. Sparkes*,<sup>13</sup> would have thought that this case might have been otherwise decided. Were it not for the doubt entertained by my Brother Willes, I must say, speaking for myself, that this case would be entirely free from doubt.

The declaration is in the ordinary form, and alleges that the defendant broke and entered the plaintiff's land, and there broke down and destroyed certain gates and fences. If to that declaration the defend-

<sup>1</sup> 16 M. & W. 829.

<sup>2</sup> 9 Ex. 158; 23 L. J. (Ex.) 12.

<sup>3</sup> 8 Q. B. 174.

<sup>4</sup> 11 Ad. & E. 665.

<sup>5</sup> 8 T. R. 292.

<sup>6</sup> 2 Ex. 418.

<sup>7</sup> 9 M. & W. 686.

<sup>8</sup> 3 Wils. 20.

<sup>9</sup> Cited in 8 T. R. 297.

<sup>10</sup> 2 Wils. 313.

<sup>11</sup> Willes, J., had left the court at the conclusion of the argument.

<sup>12</sup> 9 Ex. 158; 23 L. J. (Ex.) 12.

<sup>13</sup> 10 M. & W. 486.

ant had pleaded not guilty, to entitle the plaintiff to a verdict, it would have been sufficient for him to have proved that the defendant did break and enter his land; and if it had turned out during the trial that there were no gates and fences on the land, or if there were any the defendant had not destroyed them, the plaintiff would still have been entitled to a verdict with more or less damages. But if the plaintiff had proved that there were gates on his land, and the defendant had destroyed them, the plaintiff would have been entitled to damages, not only in respect of the trespass to the land, but also in respect of the value of the gates he had destroyed. Now on this record the defendant admits the trespass complained of, but sets up as a defence that there was a right of way over the land in question, and there were certain gates and fences obstructing that way, so that by reason of the obstruction the defendant could not exercise his right, and that he therefore destroyed the gates. To this plea there was a replication taking issue on the whole plea. At the trial the plaintiff admitted a right of way across the close in question; but he offered to prove that the trespasses complained of were committed at another spot on his land within that close, and not upon any part of that portion of his land upon which he had admitted a right of way. Is not this the common case in which there must be a new assignment, and in which the evidence tendered is only admissible under a new assignment? Section 87 of the Common Law Procedure Act of 1852, allows one new assignment, which shall be consistent with and confined by the particulars delivered in the action, and it shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify. In this case what the plea professed to justify, taken with the plaintiff's admission, was a right of way from A. to B., and what he proposed to establish his claim to was damages for a trespass, not upon that portion from A. to B., but upon another portion of his land. That clearly is a case for new assignment within this section. On this part of the case *Glover v. Dixon*<sup>1</sup> and *Webber v. Sparkes*<sup>2</sup> are absolutely conclusive. It may be said that the authority of the latter case as to this point is a mere dictum of Parke, B., but its soundness has been established by *Glover v. Dixon*. I think on the authority of these cases the plaintiff ought to have new assigned. Then it is said that the breaking of the gates is a substantive trespass. I do not think so; it is mere aggravation which might increase the amount of damages. On these grounds we are of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

*Judgment affirmed.*<sup>3</sup>

<sup>1</sup> 9 Ex. 158; 23 L. J. (Ex.) 12.

<sup>2</sup> 10 M. & W. 485.

<sup>3</sup> *Bracegirdle v. Peacock*, 8 Q. B. 174; *Webber v. Sparkes*, 10 M. & W. 485, *Glover v. Dixon*, 9 Ex. 158, *accord.* — ED.



Arrest of Judgment had same effect as nonsuit merely through threw parties out of Court & the action might be brought again.

Much like a nonsuit.

Gen'l Rule is that a Deft. may take any advantage of Dec. on arrest of Judgment that he could on Gen'l Demurrer.

Formal defects in pleading are cured unless opponent demurs specially.

Substantial defects may be cured

1. If Opponent in his pleading expressly admits the fact which ~~defect~~ should have party should have pleaded.
2. If verdict has been had & the fact must have been proven in order to gain the verdict, and is reasonably inferrible from fact which were alleged. ~~The verdict will stand & the defect is cured~~

Br and. 113. Archbold, 164.

18 cases

## CHAPTER VII.

## MOTIONS BASED ON THE PLEADINGS.

## SECTION I.

*Arrest of Judgment.*

## BARRET v. FLETCHER.

IN THE KING'S BENCH, EASTER TERM, 1609.

[Reported in Crooke's James, 220.]

~~265~~Order.

265. DEBT, upon an obligation of five hundred pounds, conditioned to stand to the award of J. S. and T. D., so that, &c.
- 266, *1st*. The defendant pleaded, that the arbitrators did not make any award.
- 266, *2nd*. The plaintiff replies, and shows the award, but assigns no breach.
268. The defendant rejoins, that the award pleaded is not the arbitrator's award; whereupon, issue being joined, a verdict was given for the plaintiff.
276. It was moved in arrest of judgment, because the plaintiff in his replication not having assigned any breach of the award, there was not cause of action; for the obligation is not for debt, but is guided by the condition, which is for the forbearance of a collateral thing, and the court ought to be satisfied that the plaintiff had good cause of action, otherwise they cannot give judgment; for although a verdict be given for the plaintiff, yet this defect in the replication is matter of substance, and is not helped by the statute.
281. The court being of that opinion, judgment was stayed.<sup>1</sup>
- 283.
- 286.

<sup>1</sup> "In no case where it appears that a man has no title to recover shall he ever have judgment; for if it happen that an issue is improperly joined and found for the plaintiff, although the defendant would allow the plaintiff to have judgment, still we will not give you judgment. So it is where an action is brought against two, and the plaintiff is nonsuited as to one although the other will not take advantage of this, but confesses the action, still we ought not to give judgment, &c., for we ought not to give judgment except when it appears to us that there is ground for it." Per Choke, C. J., in *Tilly v. Wody*, Y. B. fol. 81, pl. 18. — Ed.

✓  
BROOKE v. BROOKE AND OTHERS.

IN THE KING'S BENCH, EASTER TERM, 1664.

[Reported in 1 Siderfin, 184.]

IN trespass for taking a hook, &c., the defendant pleaded that he had a way to such a wood across the land of the plaintiff, that he was passing there, and that the plaintiff endeavored to cut his harness and to wound him with the said hook, wherefore he took the said hook out of the hands of the plaintiff, and delivered it to the constable, &c. Issue upon the way, and verdict for the plaintiff. And it was moved, in arrest of judgment, that the plaintiff had not shown in his declaration that the hook was in his possession. And it was agreed by the court, that if the defendant had pleaded Not guilty, the judgment should be arrested, because the plaintiff does not say in his declaration *hamum suum*, nor show that it was in his possession. But in this case the court were of opinion that the defendant, by his special plea, made the declaration good, for the defendant pleads that he took the hook *extra possessionem* of the plaintiff, wherefore the plaintiff may well maintain this action on his possession without any property<sup>1</sup>

—  
✓  
LEACH v. THOMAS.

IN THE EXCHEQUER, EASTER TERM, 1837.

[Reported in 2 Meeson &amp; Welsby, 427.]

ASSUMPSIT.<sup>2</sup> The declaration set forth seven breaches. The defendant pleaded nine pleas.

At the trial before Patteson, J., at the Pembrokeshire Summer Assizes, 1835, the plaintiff had a general verdict on all the issues — damages, £20. In the following Michaelmas term, —

*Evans* obtained a rule *nisi* to arrest the judgment, on the ground that the third, fourth, and sixth breaches were bad. The case stood over for some time, in order that an application might be made to the

*sup. p. 272* <sup>1</sup> *Drake v. Corderoy*, Cro. Car. 288; *Osborne v. Brooke*, Aleyn, 7; *Slack v. Lyon*, 9 Pick. 82; *Vaughan v. Havens*, 8 Johns. 110 (*semble*), accord. *Badcock v. Atkins*, Cro. El. 416; *Pelton v. Ward*, 3 Cal. 78, *contra*. See *Willion v. Berkeley*, Plowd. 230; *Wright v. Goddard*, 8 A. & E. 144; *Butt's Case*, 7 Rep. 24.

<sup>2</sup> The pleadings have been abbreviated, and only so much of the case is given as relates to the propriety of the motion in arrest of judgment. — Ed.

*See Ridgway's Case* *this is contra.*  
*also p. 272.*

Fresno for taking a hook.

Plea that Deft. was using a right of way & Pltff. tried to cut harrow & would have taken hook wherefore he took hook out of Pltff's possession.

Issue on way & V. for Pltff. Moved in arrest of J. that Dec. did not allege that hook was in possession of Pltff.

Held that had Deft. pleaded not guilty Dec. could have been objected to but in his Plea he expressly states that he took hook from possession of Pltff. thus curing Dec.

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How Dec. would have been demonstrable.

But how Deft. expressly admitted that hook was in Pltff's possession.

This defect is Obsolete.

Pleading over generally does not admit defect in Substantive but when fault is in omission Deft. & Co. ...



Ptff had a verdict on special  
breaches & general damages  
were alleged. Deft moved  
in arrest of J. that special  
of the breaches alleged were  
bad in substance.

Held that an arrest of judge-  
ment cannot be given in  
such a case but that a  
verdict de novo be ordered  
that jury may assess dam-  
ages on good count.

---

Here record shows conclusively  
that ~~Deft~~<sup>Ptff</sup> is entitled to some  
thing & only ? is how much.  
~~Deft~~ not entitled to try whole  
thing over.

learned judge to amend the record; but his lordship having declined to do so,—

*E. V. Williams* and *Leach* now showed cause. The defendant is not entitled to arrest the judgment; even if any of the breaches be bad, he can be entitled only to a *venire de novo*. In Tidd's Practice, p. 922 (9th ed.), one of the cases in which it is said that a *venire de novo* is grantable is, "when the jury give general damages on a declaration consisting of several counts, and it afterwards appears that one or more of them is defective." *Eddowes v. Hopkins*,<sup>1</sup> and *Grant v. Astle*,<sup>2</sup> are authorities to support this position. *Richardson v. Mellish*,<sup>3</sup> *Angle v. Alexander*,<sup>4</sup> and *Day v. Robinson*,<sup>5</sup> are cases in all of which a *venire de novo* was awarded where general damages were given on several counts, one of which was bad; and a bad breach is not distinguishable in this respect from a bad count. In *Trevor v. Wall*,<sup>6</sup> which will be referred to for the defendant, the court undoubtedly refused a *venire de novo*, and arrested the judgment altogether; but that was on the ground that the proceedings originated in an inferior court, in which case a court of error has no power to grant a *venire de novo*.

*Evans*, contra. *Holt v. Scholefield*<sup>7</sup> is a distinct authority to show that where some counts are good and others bad, and general damages are given, the court will arrest the judgment and not award a *venire de novo*. *Sicklemore v. Thistleton*<sup>8</sup> is to the same effect. *Eddowes v. Hopkins* does not apply; that was an application to amend the entry of the verdict on the *postea* by the judge's notes. In the other cases cited for the plaintiff, the *venire de novo* was awarded by the court of error.

PARKE, B. This case must go down to a new inquiry. On this verdict we know that the defendant has been guilty of all the breaches assigned, but we do not know what amount of damages are to be ascribed to each. Our present decision is undoubtedly at variance with that of *Holt v. Scholefield*; that case, therefore, must be considered as overruled as to this point. If the court of error can grant a *venire de novo* in such a case as this, *a fortiori* the court having original jurisdiction in the cause may do so. Unless, therefore, the parties can agree on some terms of compromise, the rule must be absolute for a *venire de novo*, in order that the jury may assess the damages on the good breaches.

ALDERSON, B. It does not appear that this point was at all argued in *Holt v. Scholefield*, though *Grant v. Astle* was referred to; the whole

<sup>1</sup> Dougl. 877.

<sup>2</sup> Ib. 722.

<sup>3</sup> 3 Bing. 849.

<sup>4</sup> 7 Bing. 119; 4 M. & P. 870.

<sup>5</sup> 1 Ad. & Ell. 554; 4 Nev. & M. 884.

<sup>6</sup> 1 T. R. 151.

<sup>7</sup> 6 T. R. 691.

<sup>8</sup> 6 M. & Sel. 9.

of the argument was addressed to the question as to the sufficiency of the declaration.

*Venire de novo awarded.*<sup>1</sup>

✓ GORDON, REID, AND PHIPPS v. ELLIS AND ANOTHER.

IN THE COMMON PLEAS, JUNE 11, 1844.

[Reported in 7 Manning & Granger, 607.]

ASSUMPSIT for money had and received, and upon an account stated.

Pleas — fifthly,<sup>2</sup> as to so much of the causes of action as related to the sum of £352 1s. 8d., parcel of the moneys in the declaration mentioned — that, before the said moneys had been had or received by the defendants, and also before the stating of the accounts in the declaration mentioned, or either of them, to wit, on the first of July, 1842, the plaintiffs carried on the trade and business of founders in partnership together; and thereupon, while they (the plaintiffs) continued to be and were such partners as aforesaid, to wit, on &c., aforesaid, Gordon, with the privity and concurrence of the other plaintiffs, requested the defendants (they then and still being and carrying on in partnership together the trade or business of auctioneers and appraisers), and also then retained and employed them the defendants to put up to sale and dispose of certain property of and belonging to the said firm and to the plaintiffs as such copartners as aforesaid; which they the defendants then consented and agreed to do: that at the time when Gordon so requested them to sell and dispose of the said property, and also at the time of their selling and disposing thereof, and of their making the loans and advances to Gordon thereafter mentioned, the defendants believed that Gordon was the sole and exclusive owner of the said property, and had full power and lawful and absolute authority to sell and dispose of the same, as his own property, and for his own sole use, benefit, and advantage, the defendants then having no knowledge or notice whatsoever that the other plaintiffs or any other person had any right, title, estate, or interest whatsoever in the said property: that, after they had been so applied to and requested and retained and employed by Gordon to sell and dispose of the said property as aforesaid, and before the same

<sup>1</sup> Ayrey v. Fearnside, 4 M. & W. 168; Gould v. Oliver, 2 M. & G. 231; Lewin v. Edwards, 9 M. & W. 720; Empson v. Griffin, 11 A. & E. 187; Emblin v. Darnell, 12 M. & W. 880, *accord.* Grant v. Astle, Doug. 730; Trevor v. Wall, 1 T. R. 151; Hancock v. Haywood, 8 T. R. 435; Holt v. Scholefield, 6 T. R. 691; Sicklemore v. Thistleton, 6 M. & S. 9, *contra*, are overruled. Conf. Corner v. Shew, 4 M. & W. 163. Kitchenman v. Skeel, 8 Ex. 49. — Ed.

<sup>2</sup> The first four pleas are omitted. — Ed.

Assumpsit, for money had & received, &c.

Plea, 5, an agreement that  
Deft apply money to pay-  
ment of loans made by  
him to me of Pltfs, Jordan, &  
that other partners concurred.  
Repli', that other partners did  
not concur.

Jurisdiction. Verdict For Pltfs  
Motion in arrest of J. that  
the issue taken to 5th plea  
was on an immaterial point.  
Held that such was the case  
but that the J. could not  
be arrested for Pltfs has  
won on other issues & the  
Ct. granted a repleader.

Repleader used in later  
times, as a means of doing  
justice. When Arrest of J.  
or J. non obstante Verdicts  
it awarded a repleader.

parties plainly & strictly for  
defect in pleading but this  
was hard then sometimes  
repleader allowed.

Had party lost in mater-  
ial issue then Ct. would  
not have allowed repleader  
but here he won the im-  
material.

had been sold or disposed of, and before they had any notice or knowledge whatsoever that Gordon was not solely and exclusively possessed of and interested in the said property, to wit, on the first of January, 1842, and on divers other days and times between that day and the commencement of the suit, the defendants, at the request of Gordon, lent and advanced to him divers sums of money, in the whole amounting to the sum of money in the introductory part of that plea mentioned; that, before the defendants lent or advanced the last-mentioned moneys or any part thereof to Gordon, to wit, on &c., last aforesaid, it was agreed between him and them that the defendants should and might retain, deduct, and reimburse themselves the full amount of the said moneys out of the proceeds of the said property so to be sold and disposed of as aforesaid; that the defendants were induced to advance and lend the said moneys, and did advance and lend the same, to Gordon upon the faith and confidence and in consideration of the last-mentioned agreement, and not otherwise: that afterwards, and before the commencement of the suit, to wit, on &c., aforesaid, the defendants did sell and dispose of the said property for Gordon, the other plaintiffs at the several times aforesaid suffering and permitting Gordon to deal therewith as his own sole property without objection or interference, and afterwards, and before the commencement of the suit, to wit, on &c., last aforesaid, received the money for which the same was so sold as aforesaid: that the said money in the declaration mentioned to be due from them to the plaintiffs was the same identical money which the defendants received as the price, purchase-money, and proceeds of the said property, and not other or different; wherefore they (the defendants) did, in pursuance of the said agreement, and before the commencement of the suit, retain the said sum of money in the introductory part of that plea mentioned, for the purpose of reimbursing themselves the moneys so advanced and lent by them to Gordon as aforesaid. Verification.

Sixthly, as to so much of the causes of action as related to the sum of £350, other parcel of the moneys in the declaration mentioned than the sum in the introductory part of the fifth plea — a similar plea to the last.

To the fourth, a traverse of the alleged payment. To the fifth plea the plaintiff replied that Reid and Phipps did not suffer or permit Gordon to deal with the property in the fifth plea mentioned as his own sole property, *modo et forma*. To the sixth, that Reid and Phipps did not suffer or permit Gordon to deal with the said property as his sole property, without objection or interference,<sup>1</sup> *modo et forma*.

At the trial before Coltman, J., at the sittings at Westminster after

<sup>1</sup> *Quære*, whether the words *in status* do not raise a negative pregnant.

last Hilary term, a verdict was found for the plaintiffs, damages £835 18s. 4d., beyond the £160 paid into court.

Sir *T. Wylde*, Serjt., in Easter term last, obtained a rule *nisi* to arrest the judgment as to so much of the demand as was included in the introductory part of the fifth and sixth pleas,<sup>1</sup> on the ground that the replications to those pleas took issue upon an immaterial allegation, and left unanswered sufficient matter to constitute a good bar to so much of the cause of action as those pleas respectively professed to answer. He cited *Wallace v. Kelsall*,<sup>2</sup> *Jones v. Yates*,<sup>3</sup> *Sparrow v. Chisman*,<sup>4</sup> *Jacaud v. French*,<sup>5</sup> *Richmond v. Heapy*.<sup>6</sup>

*Channell*, Serjt. (with whom was *Bovill*), on a former day in this term, showed cause.<sup>7</sup>

At any rate the defendants cannot call upon the court to arrest the judgment, inasmuch as it is admitted that the plaintiffs are entitled to retain their verdict on the third issue. All that the court could do in this case would be to award a repleader; but this is never granted to the party who is guilty of the first fault in pleading. *Com. Dig. tit. Pleader* (R. 18.); *Plomer v. Ross*; <sup>8</sup> *Wordsworth v. Brown*.<sup>9</sup>

Sir *T. Wilde* and *Byles*, Serjts. (with whom was *J. W. Smith*), in support of the rule.

Passing by the parts of the plea which disclose a good answer to the action, the plaintiffs have traversed an immaterial fact. This is not a case in which the court will grant a repleader. Where a party who has taken an immaterial issue succeeds, he may have a repleader, but where, as here, the plea contains a good answer, which is not traversed and must be taken to be admitted, the plaintiffs are not entitled to a repleader, but the defendants have a right to the benefit of the record as it stands. [TINDAL, C. J. As these pleas go only to a part of the demand, how can we do otherwise than award a repleader? We are asked to arrest the judgment — arrest as to what?] Where a perfect legal bar is confessed, there can be no repleader, although the issue be immaterial; *Com. Dig. tit. Pleader* (R. 18). In *Plomer v. Ross*, and *Wordsworth v. Brown*, the record was obviously imperfect. In *Negelin v. Mitchell*,<sup>10</sup> it was held, overruling the case of *Plummer v.*

<sup>1</sup> *Quære*, whether, if the judgment had been arrested, it must not have been arrested *in toto*, entire damages being assessed. It is true that specific sums are made in the introductory parts of the fifth and sixth pleas, but *non constat* that the damages sustained by reason of the non-payment of £352 1s. 8d. and £350, corresponded in amount with those sums.

<sup>2</sup> 7 M. & W. 264; 8 Dowl. P. C. 841.      <sup>3</sup> 9 B. & C. 532; 4 Mann. & R. 613.

<sup>4</sup> 9 B. & C. 241; 4 Mann. & R. 206.      <sup>5</sup> 12 East, 317.      <sup>6</sup> 1 Stark. N. P. C. 202

<sup>7</sup> It was contended that the allegation traversed in the replications was material but the arguments and opinion on this point are omitted. — Ed.

<sup>8</sup> 5 Taunt. 386; 1 Marsh. 96.      <sup>9</sup> 8 Dowl. P. C. 698.      <sup>10</sup> 7 M. & W. 612.







Lee, that, where there are several pleas on the record, if one of them traverse immaterial matter in the declaration, and the defendant has pleaded other material matters which have been disposed of on proper issues, the court will not grant a repleader. According to the authorities, a repleader is never granted to the party committing the first fault. *Webster v. Bannister*; <sup>1</sup> *Kempe v. Crewes*.<sup>2</sup> [TINDAL, C. J. A repleader is rather the act of the court, where it sees that justice cannot be done without adopting that course.] *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

The second point for consideration is, whether, under these circumstances, the judgment should be arrested. The replication has traversed the allegation in the plea, "that Gordon was suffered and permitted by the other plaintiffs to deal with the property as his own;" upon which issue being joined, the jury have found for the plaintiffs. But this traverse is taken by the plaintiffs, as it appears to us, on an immaterial point — a point upon which, after the finding of the jury, we are unable to determine the right between the parties; for, suppose the other partners did not suffer Gordon to deal with the property as his own, he still had all the rights which a copartner has with respect to this property — one of which was, to make the agreement with the defendants set out in the plea. The finding, therefore, decides nothing between the parties. At the same time, it is to be observed, there are two material allegations in the plea, either of which, if traversed and the issue found for the plaintiffs, would be decisive of the right; for, if the agreement set out in the plea is denied, or the advance of the moneys under it, and either of such issues is found for the plaintiffs, there is no defence to the action.

In this state of the record, we are of opinion that the proper course is, not to arrest the judgment, but to give judgment *quod partes re-placitent*, in order to give the party who has made the first fault in pleading, the opportunity of setting it right. See the authorities collected in Bacon's Abridgment, Pleas and Pleadings (M. 1). And the adverse party has no right to complain of this course; for he is, in some degree, instrumental to it himself, by going down to trial upon an immaterial issue. This distinction seems to be established by the late case of *Atkinson v. Davies*,<sup>3</sup> which was not adverted to in the course of the argument. And, as to the argument used at the bar, that a repleader is never awarded in favor of that party who made the first fault, that doctrine only holds where the immaterial issue is found against the party who made the first fault in pleading; as is stated,

<sup>1</sup> 1 Dougl. 896.

<sup>2</sup> 1 Lord Raym. 167; 2 Lutw. 1577.

<sup>3</sup> 11 M. & W. 286.

*arguendo*, in the case of *Kempe v. Crewes*; for which the authorities are there cited; yet, in the present case, it cannot apply, where the issue is found in favor of the plaintiffs, who took it.

We, therefore, think there should be an award of repleader.

*Rule accordingly.*

*omit*

SLACK v. LYON AND ANOTHER.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1825.

[Reported in 9 Pickering, 62.]

THIS was a complaint under the statute, in order to obtain damages for overflowing the complainant's land. His complaint alleged, that the defendants "have maintained and kept up a dam across Charles River for six years last past, and still do maintain and keep up said dam, whereby the lands" of the petitioner, since May 25, 1825, "have been overflowed and greatly damaged."

The respondents pleaded, that a jury ought not to be impanelled to appraise the yearly damage, because they are seised and in the possession and occupation of certain mills on and below the dam, and by reason of such seisin, possession, and occupation by them and those whose estate they have, they, for all the time mentioned in the complaint, had, and still have a right, by means of the dam, to raise the water as high as it has been raised by this means during the time mentioned in the complaint, without paying damage.

The replication denied the right of the respondents to raise the water as high as it had been raised, without paying damage. Issue was thereupon joined, and a verdict found for the complainant. The respondents then moved in arrest of judgment, because the complaint did not allege that the dam was erected and kept up, and the water raised for the purpose of working or turning any water-mills, or that there were any mills on, below, or connected with the dam, by means of which the complainant's land was overflowed.

*Richardson* and *Cushing*, in support of the motion, contended that the defect in the complaint was one of substance, and that it was not cured by the verdict or by the respondents' pleading over. They cited *St. 1795, c. 74*; *Kingsley v. Bill*,<sup>2</sup> *Stilson v. Tobey*,<sup>3</sup> *Avery v. Tyringham*,<sup>4</sup> *Wells v. Prince*,<sup>5</sup> *Fuller v. Holden*,<sup>6</sup> *Spear v. Bicknell*,<sup>7</sup> *Cutler v.*

<sup>1</sup> See *Doogood v. Rose*, 9 C. B. 182 — Ed.

<sup>2</sup> 9 Mass. R. 198.

<sup>3</sup> 2 Mass R. 521.

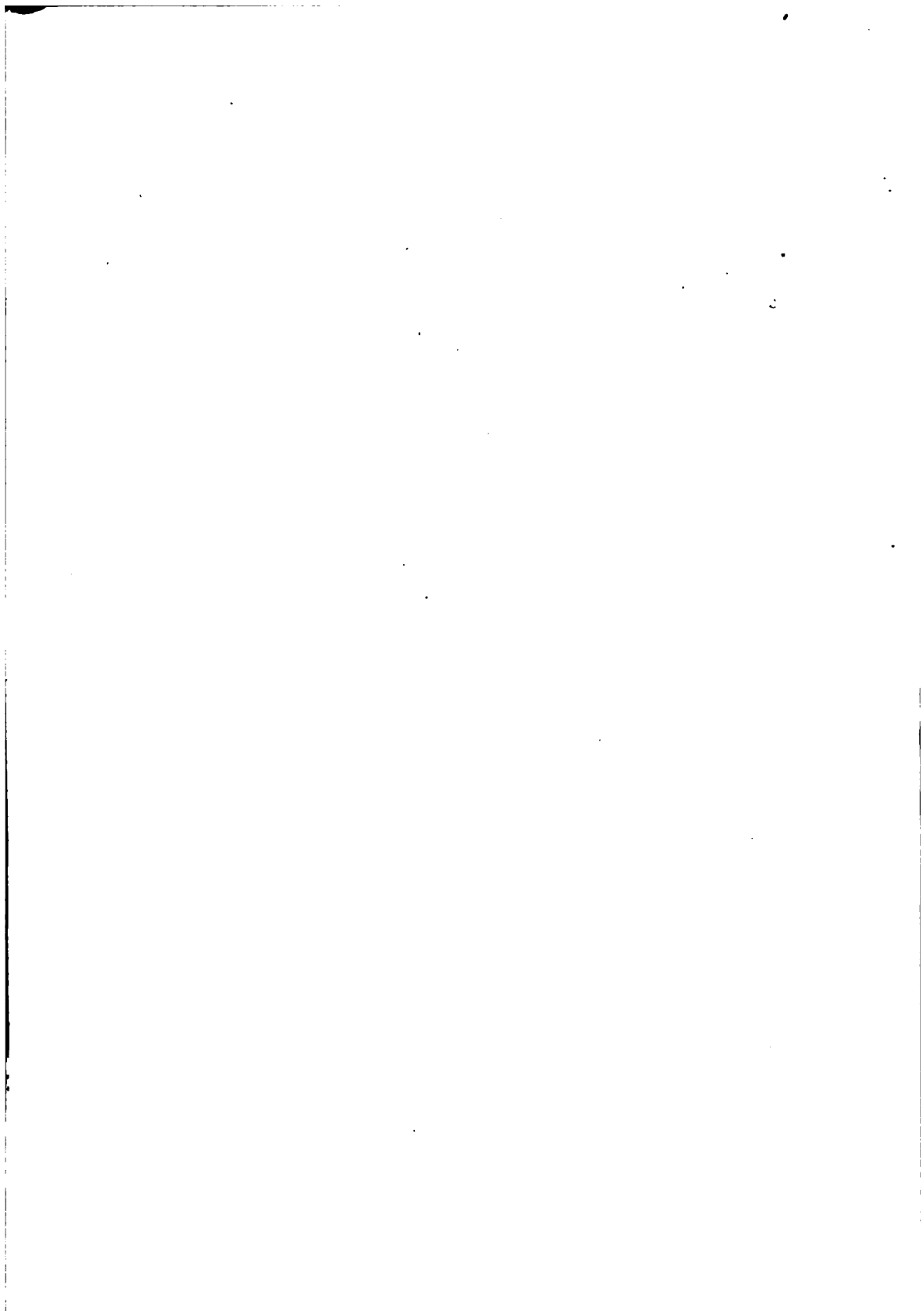
<sup>4</sup> 8 Mass. R. 160.

<sup>5</sup> 4 Mass. R. 64.

<sup>6</sup> 4 Mass. R. 498.

<sup>7</sup> 5 Mass. R. 182.





Southern,<sup>1</sup> *Badcock v. Atkins*,<sup>2</sup> *Pelton v. Ward*,<sup>3</sup> *Bonham's Case*,<sup>4</sup> *Elwis v. Lombe*,<sup>5</sup> *Rigeway's Case*, *Butt's Case*.<sup>6</sup>

*Metcalf*, for the complainant, admitted that the defect in the complaint was not cured by the verdict, but insisted that it was cured by the plea in bar. The old rule in Co. Lit. 303 b, that when a count is defective "by omission of some circumstance, as time, place, &c., there it may be made good by the plea of the adverse party, but if it be insufficient in matter, it cannot be salved," meant only that matters of form, but not of substance, are waived by mere pleading over. *Anon.*, 2 Salk. 519; *Dunning v. Owen*.<sup>7</sup> But, however this may be, the weight of authority, as well as the better reason, is, that an express admission in a plea, of a material fact omitted in the count, supplies the defect. The cases of *Drake v. Corderoy*,<sup>8</sup> and *Osborne v. Brooke*,<sup>9</sup> have overruled *Badcock v. Atkins*, cited on the other side. The approbation by Spencer, J. (in 3 Caines), of the latter case, was retracted in *Vaughan v. Havens*,<sup>10</sup> and the authority of *Drake v. Corderoy* recognized. *Metcalf* also cited *Brooke v. Brooke*, *Zerger v. Sailer*,<sup>11</sup> *Gelston v. Hoyt*.<sup>12</sup>

PARKER, C. J., delivered the opinion of the court. No doubt the complaint is insufficient, as it does not bring the case within the statute; but the defect is cured by the plea. The plea sets forth the purposes for which the water was raised, bringing the case within the statute. The merits of the question have been tried, and the respondent ought not to be allowed to go back to a fault which he ought to have discovered at the beginning, unless the law clearly requires it.

The authorities are contradictory; some maintaining that a count defective in substance cannot be cured by pleading over; others the contrary. We are at liberty to follow those which seem to be founded on the better reason. Two of the old cases very decidedly maintain the affirmative; that in Cro. Car. 288, where a count for slander, defective in substance, was cured by the defendant's plea, and the case in *Siderfin*. In this last case the plaintiff counted against the defendant in trespass, alleging that he had taken his hook. The defendant pleaded, that the plaintiff being about to strike him with the hook, he took it out of his hands in order to deliver it to a constable. It was moved in arrest, for that the plaintiff had not averred that the hook was in his possession. The court said, had the defendant pleaded the general issue, the plaintiff could not have had judgment; but having shown that he took the hook out of the possession of the plaintiff, he had thereby cured the defect in the count. These two cases do not

<sup>1</sup> 1 Saund. 116.

<sup>4</sup> 8 Co. 120.

<sup>7</sup> 14 Mass. R. 162.

<sup>10</sup> 8 Johns. R. 109.

<sup>2</sup> Cro. Eliz. 416.

<sup>5</sup> 6 Mod. 119.

<sup>8</sup> Cro. Car. 228.

<sup>11</sup> 6 Bin. 24.

<sup>3</sup> 3 Caines, R. 18.

<sup>6</sup> 7 Co. 25.

<sup>9</sup> Aleyn, 7.

<sup>12</sup> 18 Johns. R. 141.

appear to have been overruled in England; on the contrary, they are cited in the digests and text-books without disapprobation, down to the recent work on pleading by Stephen.

In New York, however, a contrary doctrine was held, it being laid down in the case in 8 Caines, that a count defective in substance can in no case be cured by the defendant's plea; and the case of *Drake v. Corderoy* passed in review before the court. But in a later case, in 8 Johns. Rep., the case of *Drake v. Corderoy* is distinctly put to the court, and Spencer, J., who delivered the opinion, expressly admitted its authority.

The way then is open to us to adopt the more reasonable doctrine, which we think is, that when the defendant chooses to understand the plaintiff's count to contain all the facts essential to his liability, and in his plea sets out and answers those which have been omitted in the count, so that the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the court that all the material facts were in issue, the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy.

One of the counsel for the defendant has attempted to show that the defects in the two cases above cited, which were allowed to be cured by the plea, were in form only; but in the case of the hook, the court go upon the ground that it was substance; and the case shows that it was. And so was the other case, of *Drake v. Corderoy*. The counsel have ingeniously attempted to escape from those cases, by showing that the defects were only in particularity of the averment; but the particulars left out were essential to the averment, so that it was substantially defective.

*Motion in arrest overruled.*<sup>1</sup>

<sup>1</sup> See *Wilkinson v. Sharland*, 10 Ex. 724; *France v. White*, 1 M. & G. 781. — Ed.





Plf. always made the motion.  
Def. might have made it  
in certain Cases but didn't.  
6 Q. B. 683, 705

These motions are based  
on Verdict not on Evidence.

Non obstante Verdicts.

Arise wholly on Record.

Ordinarily if Def. wins  
on issue he wins case.

If Def. wins an immaterial issue he is not entitled to J. & maybe Plf. is.  
though Plf. may not be.

## SECTION II.

*Non-Obstante Veredicto.**omit*

LACY v. REYNOLDS.

IN THE QUEEN'S BENCH, HILARY TERM, 1591.

[Reported in Croke's Elizabeth, 214.]

ACTION for words, which were, "He is as very a thief as any is in Warwick goal;" and avers that J. S. was then a prisoner in Warwick jail, condemned for horse stealing; and it was clearly held that for these words action did lie, with this averment, but not otherwise.

After verdict, this matter was alleged in arrest of judgment, that the defendant did plead the bar, *quod quidam ignotus* came to Warwick, and there cut the purse of J. N., and the plaintiff *sciens* this, him did receive and comfort, and by reason of it spoke the words. The plaintiff replied *de injuria sua propria*; and upon this, issue was joined, and found for the plaintiff. It was alleged that the issue is ill joined, for this matter doth not prove the plaintiff a thief, although it doth prove him a felon. The court held that the issue was not well joined; but they conceived that, inasmuch as he had by this confessed the words, although the issue is misjoined, and a mis-trial, yet this is as void, and the court shall give judgment upon his confession; and the plaintiff shall not have his damages taxed by the court, but shall have a new writ to inquire of damages. And it was so adjudged. *Vide* 22 Edw. IV. pl. 46.<sup>1</sup>

*omit*

CRAVEN v. HANLEY.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1738.

[Reported in Barnes's Notes, 255.]

THIS was an action of trespass, whereto defendant pleaded a bad justification. Plaintiff took issue, and defendant obtained a verdict.

<sup>1</sup> Cook v. Pearce, 8 Q. B. 1044, accord. — ED.

Plaintiff moved an arrest of judgment, and the court heard counsel on both sides several times, and took time to consider; and in Easter term last made a rule to stay the entry of judgment on defendant's verdict, and that plaintiff should have leave to sign judgment, the trespass being confessed by the plea.<sup>1</sup>

LAMBERT v. TAYLOR AND ANOTHER, EXECUTORS OF GEORGE RENTON, DECEASED.

IN THE KING'S BENCH, EASTER TERM, 1825.

[Reported in 4 Barnewall & Cresswell, 188.]

DECLARATION<sup>2</sup> stated George Renton, on the 12th day of May, 1818, at, &c., made his promissory note in writing for £200, and delivered the same to J. Y., whereby, &c. It then averred the death of G. R. without payment of the note; that on the 11th of November, 1818, it was found that J. Y. was a *felo de se*, whereby the said note was forfeited to the late king; that on the 23d day of November, 1821, his present Majesty gave by his warrant the said note to J. Lambert, the plaintiff, &c. Breach, non-payment by Renton in his lifetime, or by the defendants, his executors. Plea, first, non-assumpsit by G. Renton, and issue thereon. Secondly, that the supposed promissory note in the declaration mentioned became due and payable to J. Younghusband in his lifetime, and that the supposed causes of action in the declaration mentioned did not accrue to the said J. Younghusband at any time within six years next before the exhibiting of the plaintiff's bill; upon which plea issue was taken in the replication. Thirdly, that there was not any such record of the said supposed inquisition before the aforesaid coroner as the said plaintiff had in his declaration alleged. To which plea the plaintiff replied, that there was such a record; and issue was joined upon the record, which record was produced to the court, and

<sup>1</sup> *Biss v. Stockton*, 2 Roll. Abr. 98, pl. 2; *Broadbent v. Wilks, Willes*, 380; s. c. 1 Wils. 65; *Kirk v. Nowill*, 1 T. R. 266; *Drayton v. Dale*, 2 B. & C. 298; *Earl of Lonsdale v. Nelson*, 2 B. & C. 302; *Lewis v. Clement*, 8 B. & Al. 702; *Down v. Hatcher*, 10 A. & E. 121, *accord*. See *Reg. v. Darlington School*, 6 Q. B. 708-706, 719, as to the propriety of a motion for judgment *non obstante veredicto* by a defendant. — ED.

<sup>2</sup> The statement of the declaration has been abbreviated, and only so much of the case is given as relates to the propriety of the motion for judgment *non obstante veredicto*. — ED.

Action on a promissory note. Deft.  
pleaded 4 pleas all of which  
were found against him Except  
one that the action did not ar-  
ise within 6 years. In as-  
much as the note was forfeited  
to King before the statute had  
completely run the point  
was immaterial.

Held that this plea confessed  
a good <sup>right to</sup> action in the suicide  
at one time & showed no  
sufficient avoidance thereof  
I now submit verdicts for Plf.

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Confession necessary for this  
motion something more than  
constructive admission.

Theory was that it was  
a judgement by confession.  
There was All Confes.

Sims in pleadings are constructive.

At first Express Confession was necessary & when no Express Confession & issues for Dept. on immaterial affirmative plea a replication would be awarded.

This old idea.

that issue found for the plaintiff. Lastly, the defendants pleaded that his Majesty did not make any such gift or grant unto the plaintiff as the plaintiff had in his declaration alleged; and upon that plea issue was joined. At the trial, before Bayley, J., at the Northumberland Summer Assizes, 1823, the jury found a verdict for the plaintiff on the first and last issues, with £250 damages. Upon the second issue, namely, the Statute of Limitations, the jury found a verdict for the defendants.

A motion was made in this court on the part of the plaintiff to enter up judgment for him *non obstante veredicto* on the second issue.

*Tindal*, for the plaintiff

*Cross*, Serjt., *contra*.

*Tindal*, in reply.

ABBOTT, C. J., now delivered the judgment of the court, and after stating the facts of the case, proceeded as follows: In the present case the plea does not show that Younghusband was barred by the statute at the time of his death; and if he was not so barred, then a right vested in the crown, and the rights of the crown are not barred or affected by the statute. The crown is not within the operation of the statute.

The plea then being bad, the defendant certainly cannot have judgment, although the issue is found for him, the issue being taken on an immaterial matter. And the question whether the plaintiff can have judgment, or whether there ought to be a repleader, depends upon the question whether the plea does or does not contain a confession of a cause of action; if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict. If the plea does not confess a cause of action, there must be a repleader; Pitts v. Polehampton.

Now, admitting that a plea of *actio non accrevit infra sex annos* as generally pleaded does not admit that any cause of action did at any time accrue, yet this plea does not contain that matter alone, but it contains an assertion that the note became due and payable to Younghusband in his lifetime. This is an acknowledgment that Younghusband had at one time a good cause of action; and if he had a cause of action, the right to sue would upon the facts alleged in this declaration pass to the crown, and from the crown to the plaintiff, unless the defendant has alleged some matter of fact sufficient in law to show that such right did not so pass, or, in other words, unless the matter of fact pleaded in bar be a good bar in law to the action. I have already said that we think it is not a good bar; and then a cause of action being confessed and not well avoided, the plaintiff is entitled to judgment.

The rule, therefore, will be that judgment be entered for the plaintiff, *non obstante veredicto*. *Judgment for plaintiff.*<sup>1</sup>

✓ GOODBURN v. BOWMAN AND OTHERS.

IN THE COMMON PLEAS, JANUARY 17, 1838.

[Reported in 9 Bingham, 582.]

CASE for a libel. The declaration contained three counts. The defendant pleaded the general issue, and six special pleas of justification

<sup>1</sup> Filliense v. Armstrong, 7 A. & E. 557, accord.

"The principle upon which such a judgment proceeds as against a defendant is, that he has confessed the plaintiff's action, and avoided it by matter which is in substance no answer to the plaintiff's action; and, in such a case, although the issue raised upon that matter has been found for the defendant, yet the court gives judgment for the plaintiff as upon a confession. There are four descriptions of judgments for a plaintiff — on verdict, demurrer, *nil dicit*, and confession; *Rex v. Philips*, Str. 896; and this belongs to the last, and is classed under that head; and all the cases in the books which I have been able to find are founded on that principle. Thus, in the form referred to by my brother Coltman [14 Viner's Abridgment, Judgment (D.), pl. 1], the judgment proceeds upon the confession in the plea of the matters in the declaration, and want of sufficient matter in bar. The same in *Carthew*, 372, 2 Rolle's Abridgment, 99 Willes, 865, 866. The cases of *Lacy v. Reynolds*, Cro. Eliz. 214; *Rex v. Philips*, Str. 894; *Drayton v. Dale*, 2 B. & C. 293, 3 D. & R. 584; *Earl of Lonsdale v. Nelson*, 2 B. & C. 812, 3 D. & R. 556; *Lambert v. Taylor*, 4 B. & C. 188, 6 D. & R. 188; *Clears v. Stevens*, 8 Taunt. 413; *Lewis v. Clement*, 3 B. & A. 704; and *Rickards v. Bennet*, 1 B. & C. 223, 2 D. & R. 889, are all cases of judgments on pleas in confession and avoidance bad in substance (for, if bad in form merely, such a judgment will not be given). *Staples v. Heydon*, 2 Lord Raym. 924, 6 Mod. 10, 2 Salk. 579, 3 Salk. 121. And, after a very diligent search, I have not been able to discover a single case of this species of judgment on any other pleas than those which are technically in confession and avoidance.

"It is said that, if a plea traverses one out of several matters alleged in the declaration, it confesses the remainder to be true; and in like manner the rejoinder confesses such part of the replication as it does not deny. But I do not think it confesses the remainder in the sense which is required to found such a judgment, *non obstante veredicto*; *Hudson v. Jones*, 1 Salk. 91. That which is traversable, and not traversed, may be said no doubt to be admitted for some purpose, that is, it cannot be made a matter in dispute on the trial; and if it were taken by protestation under the form of pleading before the new rules, the matter would have been equally put out of the issue; but there would have been great difficulty in maintaining that this was a confession for the purpose of giving the plaintiff judgment. The effect of a traverse of one fact out of many is merely this, that the party pleading rests his defence on a denial of that fact only; but, if the decision of it in favor of the defendant turns out to be immaterial, I conceive the court cannot give judgment as on a confession of the other facts." Per Parke, B., in *Gwynne v. Burnell*, 6 B. N. C. 527; *Pine v. Grazebrook*, 2 C. B. 429; *Darlington v. Pritchard*, 4 M. & G. 783; *Atkinson v. Davies*, 11 M. & W. 242 (*semble*), accord. — ED.

Pltf. sued for libel.

Def't. pleaded general issue & 6 special pleas.

Tring found for Pltf. on gen'l issue & for Def't on other pleas.

Pltf. moves for J. non obstante verdicts on ground that the special pleas are bad & bad substantially in law. Argued that they do not confer for each plea must be taken by itself.

Held that taken together they do sufficiently confer & a reprieve will not be awarded unless necessary for justice. J. for Pltf. non obstante verdicts.

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Without decision on Gen'l issue motion would not have been allowed.





setting up the truth of the alleged publication.<sup>1</sup> To the special pleas the plaintiff replied *de injuria, &c.*; and at the trial before James Parke, J., last summer assizes for the county of York, the jury found for the plaintiff on the general issue, and also upon the issue raised on the fifth plea of justification, with one farthing damages; and for the defendants on the other issues.

In Michaelmas term last, the plaintiff moved for leave to enter up judgment *non obstante veredicto*, on the several issues found for the defendants, on the ground that the pleas on which those issues were raised were bad in law.

*Bompas*, Serjt., showed cause. If the pleas are bad, neither party can have judgment; the plaintiff himself having tendered immaterial issues instead of demurring. And there must be a repleader, for none of the pleas, taken singly, confess the cause of action, and each must stand or fall on its own merits. In *Lambert v. Taylor*, Lord Tenterden says, "The plea being bad, the defendant certainly cannot have judgment, although the issue is found for him, the issue being taken on an immaterial matter. And the question whether the plaintiff can have judgment, or whether there ought to be a repleader, depends upon the question whether the plea does or does not contain a confession of a cause of action; if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict. If the plea does not confess a cause of action, there must be a repleader." *Pitts v. Polehampton*, *Staples v. Heydon*.

The circumstance of the plaintiff's having a verdict upon the general issue, will not dispense with the necessity of a repleader; for, in *Rex v. Roger Philips*, Lord Mansfield says, "The rule of law as to such an immaterial issue joined, and verdict upon it, is, 'that when the finding upon it does not determine the right, the court ought to award a repleader, unless it appears from the whole record that no manner of pleading the matter could have availed.'"

*Cur. adv. vult.*

*Jones and Stephen*, Serjts., in support of the rule.

TENDAL, C. J. The declaration in this action, which contained three counts, set forth a libel, imputing to the plaintiff, who had been twice mayor of the borough of Richmond, that he had been guilty of speculation during his mayoralty, by pocketing 2*d.* per bushel for coals, which had been provided by him as mayor to be distributed amongst the poor at reduced prices. To this declaration the defendants pleaded the general issue, and six special pleas of justification, on the ground that the

<sup>1</sup> The statement of the pleadings has been abbreviated, and only so much of the case is given as relates to the propriety of the motion for judgment *non obstante veredicto*. — ED.

charges imputed by the libels were true. To the special pleas the plaintiff replied *de injuria*, &c., and at the trial, at the last assizes for the county of York, before Mr. Justice James Parke, the jury found for the plaintiff on the general issue, and also upon the issue raised on the fifth plea of justification, with one farthing damages; and for the defendants on the other issues.

A motion was made in last Michaelmas term, that the plaintiff might be at liberty to enter up judgment *non obstante veredicto*, on the several issues found for the defendants, on the ground that the pleas on which those issues were raised were bad in law, inasmuch as they did not state that the coals which had been provided by the plaintiff had been, in fact, purchased for less than the plaintiff charged for them, but merely that they might have been purchased for less by the plaintiff.

On showing cause against the rule *nisi*, which was granted by the court, it was insisted on the part of the defendants, first, that admitting the pleas to be bad, the plaintiff having taken issue upon them, instead of demurring, had himself tendered immaterial issues; and besides, it was contended that, as the pleas did not contain any confession of the matters charged in the declaration, there could not be any judgment entered for the plaintiff, but that a repleader must be awarded.

We are of opinion, in the first place, that, taking together the whole of the allegations in the respective pleas, they fully amount to a confession of the cause of action. But if this point were doubtful, it may not be improper to observe, that most of the cases in which the question respecting a repleader has been considered, were before the statute of Anne, when only one plea could be put upon the record. If, therefore, such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied. In the present case there is a verdict upon the general issue, which finds that the defendant did publish the libels. And, although in considering the merit or demerit of any individual plea, recourse cannot be had to another unless expressly referred to by such plea, yet as the application to enter the verdict is founded upon the whole record upon which it appears that the defendant has committed the grievance complained of, and has not shown any sufficient justification, it may be considered that in that point of view there is enough to warrant the application. But no rule is better established than this, that the court will not grant a repleader except where complete justice cannot be answered without it. So the law is laid down by Ashurst, J., in *Symmers v. The King*.<sup>1</sup> In the present case, why should a repleader be granted in order to enable the defendant to confess the ground of action more formally, when the court see already upon the face of the record that the jury have found him guilty of publishing the libels complained of, and at-

<sup>1</sup> Cowp. 510.

1850. Note in case may  
↑ wrong

Hard to tell  
whether means  
a confession  
or not.

Plef was accused of selling coal  
to poor for 2d a bushel more  
than he paid for ~~it~~ <sup>it</sup>. Plea  
alleged that he sold ~~them~~ <sup>it</sup> for  
2d more than he might  
have gotten it for. Of course  
bad. Evidence only of truth.

Deft on an award.

Deft pleaded three pleas. The first & third were found for P'ty. the second for Deft.

The second raised an immaterial issue.

How  
wks  
etc.  
—

Held that there must be a rejoinder for the 2nd. plea nor any of the other confessed a cause of action.

The other would have given a plain T. for P'ty. but that cannot affect the case.

See note 283 holding that when the other pleas are material & found for P'ty. T. will be given for P'ty. notwithstanding verdicts on the im-

tempted to be justified by the pleas? If it be said that the defendant, in a new plea, might state new matter in avoidance of the action, what would that be in effect but to allow him to take advantage of his own error in pleading? Upon the whole, we think the special pleas do sufficiently confess the action, but do not sufficiently avoid it; and, consequently, that the rule for entering the judgment for the plaintiff, non obstante veredicto, must be made absolute. *Rule absolute.*

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PLUMMER, ADMINISTRATRIX OF M. THOMPSON, DECEASED, v.  
LEE.

IN THE EXCHEQUER, EASTER TERM, 1837.

[Reported in 2 Meeson & Welsby, 495.]

DEBT on an award. The declaration stated, that before the making of the submission to arbitration thereafter next mentioned, certain differences had arisen and were depending between the plaintiff, as administratrix as aforesaid, and the defendant, concerning divers sums of money due from the defendant to the plaintiff, as administratrix as aforesaid, and of and concerning part of which sums of money there had been a settlement on a certain day in the lifetime of the said M. Thompson, to wit, on the 12th day of July, 1833, which settlement was the last settlement next before the making of the award thereafter mentioned; and thereupon, for putting an end to the said differences, the plaintiff, as executrix as aforesaid, and the defendant, theretofore, to wit, on the 11th June, 1835, respectively submitted themselves to the award of one J. P., to be made between them of and concerning the said differences. And the plaintiff in fact saith, that the said J. P. having notice thereof, and having taken upon himself the burden of the said arbitrament, afterwards, to wit, on the 13th May, 1836, made his certain award between the plaintiff, as administratrix as aforesaid, and the defendant, and thereby awarded that there was then due from the defendant to the plaintiff, as administratrix as aforesaid, the sum of £150, together with interest on the same from the period of the said last-mentioned settlement, on payment of which a receipt in full should be given; of which said award the defendant afterwards, to wit, on, &c., had notice. The declaration then averred that, although the plaintiff, as administratrix as aforesaid, had always been willing to receive the moneys so awarded, and on payment thereof to give a receipt in full, the defendant had not paid the same, or any part thereof, &c.; and concluded with profert of the letters of administration.

Pleas, first, that the arbitrator did not make any award of and upon

the premises in the declaration mentioned, in manner and form, &c.; secondly, that the day in the declaration in that behalf mentioned was not the day of the last settlement next before the making of the said award, in manner and form, &c.; thirdly, that no such settlement as in the declaration mentioned was at any time made. On which issues were joined.

At the trial before Alderson, B., at the Middlesex sittings in Hilary term, the plaintiff had a verdict on the first and third issues, and the defendant on the second. On a subsequent day, W. H. Watson obtained a rule to show cause why judgment should not be entered for the plaintiff *non obstante veredicto* on the second issue, on the ground that it was an immaterial one.<sup>1</sup>

*Richards*, for the defendant.

*Watson*, contra.

The court intimated that it was matter for consideration whether it would not be necessary to award a repleader, instead of entering up judgment *non obstante veredicto*, as prayed; and accordingly,

*Cur. adv. vult.*

The judgment of the court was delivered on a subsequent day in the term, by —

PARKE, B. The next question is, whether the second issue be immaterial, and what is the consequence if it be not?

We are clearly of opinion that it was immaterial. The precise day of the last settlement was of no consequence, if a last settlement had been made in the lifetime of the intestate, and before the reference. If there had been no other plea on the record, the proper course would have been to award a repleader, and not to have given judgment *non obstante veredicto*. That form of judgment proceeds on the confession in the plea, and the insufficiency of the avoidance; but in this plea there is no confession on which judgment can be given; it raises an immaterial issue, without any confession. The next question to be considered is, whether a repleader ought to be awarded, as there is another proper issue raised, and decided for the plaintiff, on this record, on which, if it stood alone, the plaintiff would clearly be entitled to judgment. In the case of *Goodburne v. Bowman*, it is for the first time suggested, that if an immaterial issue be raised by one plea, and the cause of action is fully confessed, or proved, on another, on the same record, the plaintiff is entitled to judgment on that confession, or proof, and a repleader would not be awarded. But the present case is distinguishable from that, for here no plea contains a confession of any part of the cause of action; and there is no issue upon any plea, es-

<sup>1</sup> Only so much of the case is given as relates to the propriety of the motion for judgment *non obstante veredicto*. — Ed.

material plea.

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Has no Express confession.  
Never repudiated.



Case against a witness for  
not answering a subpoena.  
Pleas: general issue & 8 spe-  
cial pleas.

One immaterial plea was  
found for Deft.

Held that although all  
the pleas were traverses  
yet Plf. must have  
I non obstante Verdicto  
for on record Plf. was  
plainly entitled to J.

Had there been no plea in  
conf. & av. yet J. would  
probably have been same.  
~~the~~ Ct. took ground  
of constructive admission.

tablishing the truth of the whole of it; and we are not aware of any precedent that a replender can be granted as to part; consequently, as there can be no judgment on a confession, there must be a replender. To save the expense of a formal judgment, the parties should amend without costs on either side.<sup>1</sup>

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COULING v. COXE.

IN THE COMMON PLEAS, DECEMBER 7, 1848.

[Reported in 6 Dowling & Lowndes, 399.]

CASE against a witness for disobedience to a *subpoena*. The declaration, after alleging that the plaintiff had sued one Thomas Foulkes in an action of trespass, and that certain issues, before then joined in that suit, came on to be tried at Kingston, stated the issuing and service on the defendant of a writ of *subpoena* on behalf of the plaintiff. The declaration then averred that the plaintiff had a good cause of action in the said suit, and that the appearance and testimony of the now defendant, in obedience to the writ of *subpoena*, were necessary and material to the trial of the said issues. Breach, that the now defendant, without lawful excuse, neglected to appear and give evidence, by reason whereof the plaintiff was obliged to withdraw the record, and was compelled to pay certain costs to the said Foulkes, and lost the benefit of certain costs which he, the plaintiff, had incurred in proceeding to the trial of the said issues.

Pleas: first, not guilty; secondly, thirdly, fourthly, fifthly, sixthly, and seventhly, traverses of material allegations in the declaration; eighthly, that the plaintiff had not a good cause of action, *modo et*

<sup>1</sup> "That being so, the next question is, whether the plaintiff is not entitled to judgment *non obstante veredicto*. We think he is, and that it is not a case for a replender. If this had been the sole plea, it would have been a case for a replender; but there are several other pleas on the record; and if one out of several pleas traverses immaterial matter in the declaration, and the defendant pleads other material matters, which are disposed of on proper issues raised upon them, the reasons for a replender cease. For this the case of *Goodburne v. Bowman*, which was recognized, with some qualifications, by some of the judges, in the case of *Collins v. Gwynne*, in Dom. Proc., is an authority, and the case of *Plummer v. Lee* in this court, in which, under similar circumstances, a replender was awarded, must be considered as overruled. Indeed, it was not disputed in the present case, that if the issue was immaterial, the plaintiff was entitled to judgment *non obstante veredicto*." Per Parke, B., delivering the opinion of the court in *Negelen v. Mitchell*, 7 M. & W. 622. *Gregory v. Brunswick*, 3 C B 481; *Crossfield v. Morison*, 7 C. B. 286; *Cook v. Pearce*, 8 Q. B. 1044, *accord*. See *Havens v. Bush*, 2 Johns. 387. — Ed

*forma*; ninthly, that the testimony of the defendant was not material to the trial of the issues; and tenthly, leave and license. Issues thereon.

Upon the trial before Parke, B., at the Guildford Summer Assizes, 1846, the jury found for the plaintiff upon all the issues except the eighth; and upon that issue they found for the defendant.

*Lush* having, in the following term, obtained a rule *nisi* on the part of the plaintiff to set aside the verdict upon the eighth plea, and for a repleader, or to enter up judgment for the plaintiff *non obstante veredicto*.<sup>1</sup>

*Pearson* showed cause.

The plaintiff is not entitled to judgment *non obstante veredicto*, for the eighth plea is not in confession and avoidance; *Atkinson v. Davies*; <sup>2</sup> *Gwynne v. Burnell*.<sup>3</sup> The court will only grant a repleader. [He referred to *Gordon v. Ellis*.]

*Lush*, contra.

If the rule laid down in *Gwynne v. Burnell* be of universal application, it is admitted that the plaintiff is not entitled to judgment *non obstante veredicto*, but that a repleader will be awarded; because the plea upon which the issue has been found against the plaintiff, is a traverse, and not in confession and avoidance. The allegation, however, which that plea traversed, was, it is submitted, immaterial, and its omission would not only not have made the declaration bad, but it would not even have effected the amount of damages to be recovered; for it was immaterial, as regards the question of damages, whether the defendant's evidence was necessary upon one, or upon all, the issues, his absence being the cause why all of them remained untried. If the ninth plea had traversed that the defendant's evidence was material upon all the issues, it would have been bad. If, therefore, the allegation traversed by the eighth plea was immaterial, and might have been struck out altogether, it is submitted that a repleader would be useless, and that the court will give judgment for the plaintiff *non obstante veredicto*; because, besides this immaterial issue, which was found for the defendant, there are others which are material and decisive of the whole cause of action which have been found for the plaintiff; *Negelen v. Mitchell*.<sup>4</sup> [CRESSWELL, J., referred to 2 Wms. Saund. 319 e, n. (h), 6th edit.]

WILDE, C. J., now delivered the judgment of the court.

<sup>1</sup> Only so much of the case is given as relates to the propriety of the motion for judgment *non obstante veredicto*. — ED.

<sup>2</sup> 11 M. & W. 286; s. c. 2 Dowl. 778, N. S.

<sup>3</sup> 6 Bing. N. C. 458; 1 Scott, N. R. 711; s. c. 7 Cl. & F. 572.

<sup>4</sup> 7 M. & W. 612; s. c. 1 Dowl. 110, N. S.

Ct. could now grant motion:

1. When Eppes admission,
  2. When some material issue is found for Pthf,
- Other wise repleader.
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The second question is, what judgment should be given on this record, taking the eighth plea to be bad? Before the statute of Anne, the question whether there should be a repleader or judgment *non obstante veredicto*, depended on whether the plea, on which the immaterial issue arises, admits a cause of action by way of confession and avoidance. But since that statute, it has been held that, although the plea, on which the immaterial issue was found for the defendant, did not confess the cause of action, if it was confessed or proved on the other pleas which were found for the defendant, there should be no repleader, but judgment for the plaintiff. And even although the pleas on which the good issues have been taken and found for the plaintiff, were not pleas in confession and avoidance, but traverses of material allegations in the declaration, and although some of the material allegations were neither traversed nor proved, nor admitted by way of confession and avoidance, it has been held that where the other material pleas enabled the court to give judgment, without requiring the parties to replead, in order to show on which side the right was, there should be no repleader, but judgment *non obstante veredicto*.<sup>1</sup> Indeed, a plea traversing an allegation in a declaration, although not for all purposes, nor in all events, an admission of the material allegations in the declaration which it does not traverse, yet may be considered as a conditional admission, that is, as admitting the allegation not traversed, in case the plaintiff can prove the allegation traversed; and it is certainly so treated in the case in which, on a single plea traversing a part of the declaration, where an issue is found for the plaintiff, the plaintiff has judgment; which he could not be entitled to, unless the court considered the material allegations which were not traversed, as being admitted; and the same consequence follows if several material traverses are all found for the plaintiff. In the present case, several traverses on material allegations of the declaration are found for the plaintiff, who has also obtained a verdict on the plea of leave and license, which is a plea in confession and avoidance; and the only issue found for the defendant does not show that the plaintiff has no cause of action. So that the court, therefore, have no difficulty in saying that the plaintiff, and not the defendant, is entitled to judgment, and have no reason to award a repleader to discover which is right. The rule, therefore, to enter judgment for the plaintiff on the eighth plea, *non obstante veredicto*, must be made absolute.

*Rule absolute.*

<sup>1</sup> See *Goodburne v. Bowman*; *Negelen v. Mitchell*, 7 M. & W. 612.

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**THE DUKE OF RUTLAND *v.* BAGSHAWE AND ANOTHER.****IN THE QUEEN'S BENCH, FEBRUARY 26, 1850.***[Reported in 19 Law Journal Reports, Queen's Bench, 234.]*

**PROHIBITION.** The declaration stated that before and at the time of the exhibiting the libel on articles hereinafter mentioned, the plaintiff had not been nor was impropiator or proprietor of the tithes annually arising or renewing in the parish of Taddington and the tithable places within the same, and the said Taddington had not been nor was a parish, and the chancel in the said articles mentioned had not nor did belong or appertain to the said inappropriate rectory, in the said articles mentioned, nor had been nor was part or parcel of the said inappropriate rectory, and the plaintiff had not been nor was in possession of the said chancel, nor was the same held, occupied, or enjoyed by him. That from time whereof, &c., there had been and still is a certain ancient and laudable custom, used and approved of within the said Taddington, that the inhabitants of Taddington from time to time, whenever the same should be requisite, should repair, at their own costs and charges, the said chancel, and have at all times, in fact, so repaired, and still of right ought to repair the chancel; and that also, from time whereof, &c., there had been and still is a certain other custom, &c., within the said Taddington, that when and as any repairs in and to the said chancel have been necessary, the chapel-wardens of the said chapelry have given orders and directions for the doing of such repairs, and employed workmen and laborers in and about the doing of such repairs, and have paid for the same, &c.; and that neither the plaintiff nor any of his ancestors or predecessors, lessees or grantees of any tithes arising within Taddington, had, nor had any of them, at any time before the exhibiting the said libel on articles, repaired the said chancel or defrayed the cost of any of the reparations made or done in or to the said chancel. That from time whereof, &c., there had been and still is a certain other custom, &c., within the said Taddington, that church or chapel rates for the repairs of the church or chapel of Taddington had been from time to time duly made, and had been collected and expended within Taddington by the chapel-wardens thereof, for the time being, and all the costs and expenses of the repairs of the said chancel had been at all times provided for and paid out of such rates by the said chapel-wardens of the said chapelry, for the time being. That from time whereof, &c., there had been and still is a certain other custom, &c., within the said Taddington, that the chapel-wardens of Taddington had yearly passed their accounts with and to the inhab-

Two in material pleas only.  
Found for Dept.

That not sufficient.

Must be at least a  
material traverse found  
for Pcty.

Whether more than one  
material traverse must  
be found is not  
settled.





itants of Taddington of the various moneys collected and expended by them on account of the church or chapel rates of Taddington, &c. That such of the tithes of Taddington as arose to the plaintiff had always before and until the exhibiting of the said libel, &c., been collected by a person appointed by the tithe-payers within Taddington, and such person had always been rated to the church and other rates of Taddington, and the said rates had always been paid to or deducted from the tithes receivable from the plaintiff by the chapel-wardens of Taddington; and that some years before the exhibiting the said libel, &c., the plaintiff agreed with the tithe-payers of Taddington to accept £70 per annum in lieu of such of the tithes as arose to him, and that the remainder of the tithes, amounting to about £15 per annum, should remain uncollected, and be taken in lieu of all church and other rates due from the plaintiff within Taddington, and that such agreement had for many years before and until the exhibiting the libel, &c., been in force and acted upon. The declaration then averred, that the defendants, on the 12th of December, 1846, caused a suit in the Arches Court of Canterbury to be promoted against the plaintiff, and in the said suit caused to be exhibited a certain libel on articles against the now plaintiff in the name of Sir Herbert Jenner Fust, Knight, Official Principal of the Arches Court of Canterbury, whereby and wherein the said official principal objected, articulated, and administered according to the tenor and effect following: First, that the rectors and impropiators of rectories are bound to sustain and amend the chancel of the parish church of their respective rectories, &c.; second, that the plaintiff was impropiator of the tithes in the parish of Taddington; third, that the rectorial tithes were sufficient to sustain the chancel of the said church of Taddington; fourth, that the said chancel belonged to the rectory; fifth, that the plaintiff was in possession of the said chancel; sixth, that the said chancel was dilapidated through the default and neglect of the plaintiff; seventh, that the plaintiff was asked and required to repair the said dilapidation, but refused to do so.

That the plaintiff, to wit, on, &c., appeared in the said Court Christian, and put in and pleaded a negative issue to the said libel on articles, and brought into the said court his responsive allegation to the same libel on articles, which was duly admitted, and did thereby allege the said several customs and matters in the introductory part of this declaration mentioned, in answer to the said libel on articles and the said charge therein contained, and did then and there offer to prove the same in due form of law. Nevertheless, the defendants, well knowing the premises, but contriving to aggrieve the plaintiff and to withdraw the cognizance and trial of the said several customs and

matters which to our Lady the Queen and not to the Courts Christian belong, &c.

Pleas, that there has not been from time whereof, &c., nor is there the said certain ancient and laudable custom used and approved of within the said Taddington, that the inhabitants of Taddington should repair at their own proper costs and charges the said chancel, &c., and have, in fact, repaired, and still of right repair the said chancel at their own proper costs and charges, &c., *modo et forma*, concluding to the country. That there had not been from time whereof, &c., nor is there the said ancient and laudable custom used and approved of within the said Taddington, that all the costs and expenses of the repairs of the said chancel, have been at all times provided for and paid out of the said rates in manner and form as in the declaration is alleged, concluding to the country, &c.

At the trial before Lord Denman, C. J., at the Derby Summer Assizes, 1848, a verdict was found for the defendants on both the issues. In the ensuing term a rule *nisi* for judgment *non obstante veredicto* was granted, and the court directed the case to be set down in the special paper, which was accordingly done.

The question for the opinion of the court was, whether judgment *non obstante veredicto* should be given for the plaintiff or not; if it was, the rule obtained was to be made absolute; if not, it was to be discharged, with the same effect in all respects as if the rule had been argued and decided in the new trial paper.

*Cowling* (*Scotland* was with him), for the plaintiff.<sup>1</sup>

[WIGHTMAN, J. How can you have judgment *non obstante veredicto* on a traverse?]

That was done in *Cowling v. Cox*, and *Crossfield v. Morrison*.<sup>2</sup> There are material parts of the declaration which are unanswered by the pleas, and are therefore admitted. In *Down v. Hatcher*,<sup>3</sup> a plea which did not answer the whole of the action was held bad, and judgment *non obstante veredicto* was given. There is no necessity that the whole cause of action be admitted, if there is an admission of some material part.

[WIGHTMAN, J. In *Plummer v. Lee* it is said judgment *non obstante veredicto* can only be given where there is a confession either in the bad plea itself or in others on the record, and *Goodburne v. Bowman* is cited. Here there is no plea confessing any of the causes of action.]

*Plummer v. Lee* is overruled by *Negelen v. Mitchell*,<sup>4</sup> *Cowling v. Cox*, and *Crossfield v. Morrison*.

<sup>1</sup> See *supra*, p. 282, note 1. — Ed.

<sup>2</sup> 18 Law J. Rep. (N. S.) C. P. 135.

<sup>3</sup> 10 Ad. & E. 121; s. c. 8 Law J. Rep. (N. S.) Q. B. 190.

<sup>4</sup> 7 Mee. & W. 612; s. c. 10 Law J. Rep. (N. S.) Exch. 349.





[PATTESON, J. In *Atkinson v. Davies*,<sup>1</sup> it was held, that judgment *non obstante veredicto* can be awarded on a pleading in confession and avoidance only, and not on the implied confession by not answering. The principle is, that, taking the whole record together, the court can see that the plaintiff is entitled to judgment.]

There is no rule prohibiting judgment *non obstante veredicto*, where a plea, whether it be in denial or in confession and avoidance, affords no answer to the action. The note (h) in 2 Wms. Saund. 319 d, observes on the doctrine of confession by not traversing, and collects all the cases on that subject. All the observations there made as to repleader are founded on *Staple v. Hayden*. It could make no difference that there were other negative issues found for the plaintiff.

[WIGHTMAN, J. The court must be able to see either by express confession or finding that all the material allegations are in the plaintiff's favor. Here there is neither confession nor finding to that effect.]

At all events, the plaintiff is entitled to have a repleader awarded. *Filleul v. Armstrong*.<sup>2</sup>

*Willes*, contra. There cannot be judgment *non obstante veredicto*, as there is no confession of any matter which would entitle the plaintiff to judgment. The utmost to which the plaintiff is entitled is a repleader.

*Cowling*, in reply.

*Cur. adv. vult.*

The judgment of the court was now delivered by —

PATTESON, J. The defendants by their plea have only traversed two of the allegations in the declaration, leaving wholly unanswered an allegation which, we think, would entitle the plaintiff to a prohibition. The issues found for the defendants therefore constitute no sufficient answer to the declaration, and are in that respect immaterial, and being traverses merely, contain no admission of the allegations not traversed, except as is expressed in the judgment of the Court of Common Pleas in *Cowling v. Coxe*, a conditional admission, that is, admitting the allegations not traversed, in case the plaintiff can prove the allegation traversed. In the present case the plaintiff did not prove the allegations traversed, and we therefore think that there is no such admission by the defendants of the matters alleged in the declaration as will entitle the plaintiff to judgment *non obstante veredicto*, and therefore there must be a repleader.

*Repleader awarded.*

<sup>1</sup> 11 Mee. & W. 286; s. c. 12 Law J. Rep. (n. s.) Exch. 169.

<sup>2</sup> 7 Ad. & E. 557; s. c. 7 Law J. Rep. (n. s.) Q. B. 7.

## SECTION III.

*Repleader.**omit.*

## SERJEANT v. FAIRFAX.

IN THE KING'S BENCH, EASTER TERM, 1661.

[Reported in 1 Levinz, 82.]

DEBT against lessee for years for the rent. The defendant pleads, that he, before the rent was due for which the action is brought, had assigned the term to another, of which the plaintiff had notice. The plaintiff took issue on the notice, and a verdict being for the defendant, it was moved by Allen, for the plaintiff, that no judgment ought to be given, but a repleader (awarded) because the issue was taken of a thing immaterial; for it is not the notice of the assignment of the term, without agreement of the lessor, or acceptance of the rent by him from the assignee, that discharges the lessor, but his agreement thereto, or acceptance of the rent from the assignee does it; and he cited Nichols's Case, in 5 Co., where issue taken of payment on a single bill being found for the plaintiff, he shall have judgment; but if it had been found that he had paid, judgment should be arrested; and the difference, he said, is when the issue is found against the pleader, judgment shall be for the plaintiff; but if for him, not. But Justice Twysden said, that if an improper issue is taken, and verdict given thereon, judgment shall be given thereupon, be it for the plaintiff or defendant; and cited 2 Cro. 575. But an immaterial issue is, whereupon the verdict the court cannot know for whom to give judgment, whether for the plaintiff or for the defendant, as in Hob. 175. And with him the Chief Justice and Wyndham wholly agreed, and awarded a repleader. See 2 Cro. 585, 3 Cro. 227, 228, and 2 Cro. 5.<sup>1</sup>

<sup>1</sup> Atkins, J., was clear that if the parties join in an immaterial issue, there shall be no repleader, because it is helped after verdict by these words in the statute, viz., "any issue;" it is not said an issue joined upon a material point; and the intent of the statute was to prevent repleaders; and that if any other construction should be made of that act, he was of opinion that the judges sat there not to expound, but to make a law; for by such an interpretation much of the benefit intended by the act to the party who had a verdict, would be restrained.

The other justices were all of opinion that since the making of this statute it had

Debt for rent.  
Plea that debt before rent b-  
cause due assigned to auo-  
thor of which plif had notice.

Repli. No such notice.

Verdict for debt.

Motion for replader.

Held for plif.

Reason: The plea is bad in  
substance as must be agree-  
ment or accepting rent by  
plif to bind him. The issue  
has not decided which  
ought to win & so replader  
granted.



Deft for scavage.

After impairment deft demands  
oyer. (Right in this game.)

Demuror for insufficiency of plea.

Rejoinder that plea is sufficient.

Court gave deft judgment since  
def't had put in no plea &  
therefore a demuror was im-  
proper.

Demuror to demand for oyer is  
proper see Chitty, I, \*449. <sup>old</sup> Granting  
that demuror was bad demand  
for oyer was bad case seems  
wrong. Perhaps right on ground  
that def't had failed entirely in plead-  
ing.

Motion for taking & impounding Cens.

Plea, toll on distress for rent.

Reply, Cattle not levant & couchant.

Verdict for def't.

Motion for repleader.

Held for def't.

Reasons: Perhaps def't charged Cattle  
in the land & then the <sup>repleader</sup> plea is  
material.

*omit*

## MAYOR, &amp;c. OF LONDON v. GORREY.

IN THE KING'S BENCH, TRINITY TERM, 1675.

[Reported in 2 Levinz, 142.]

DEBT for scavage, and declares upon a patent of Edw. IV. The defendant imparles, and in a term after demanded oyer of the letters patents (which after imparlance he ought not to have), the plaintiff demurred *quia placitum præd. in barra placitat minus sufficiens*, &c. The defendant rejoins, *quod placitum præd. est sufficiens*. *Curia*, this was no plea, and therefore does not warrant the demurrer in this form, *ideo* judgment for the defendant, and *non quod replacitent*, as was desired.<sup>1</sup>

*omit*

## KEMPE v. CREWS.

IN THE COMMON PLEAS, HILARY TERM, 1696.

[Reported in 1 Raymond, 167.]

TRESPASS for his close broken, called Broadclose, in Devonshire, and for taking and impounding three cows, &c. To all, besides the taking and impounding, the defendant pleads not guilty; and as to that, he says that he was possessed for a long term of years of the place where, &c.; that he demised to Williams for part of the term, rendering for rent; and for rent arrear he took the cattle in the place where, &c., as a distress, &c. The plaintiff replies, that the cattle were not levant and couchant; upon which issue is taken, and ver-

been always allowed, and taken as a difference, that when the issue was perfectly material there should be no replader; but that it was otherwise where the issue was not material.

And Scroggs, J., asked merrily, if debt be brought upon a bond, and the defendant plead that Robin Hood dwelt in a wood, and the plaintiff join issue that he did not, this is an immaterial issue; and shall there not be a replader in such case after verdict? *Ad quod non fuit responsum*. Read v. Dawson, 2 Mod. 140.

Love v. Wotton, Cro. El. 245; Sandback v. Turvey, Cro. Jac. 585; Tryon v. Carter, 2 Stra. 994; Enys v. Mohen, 2 Stra. 847; Workman v. Chappel, Hard. 831; Coxe v. Cropwell, Cro. Jac. 5; Plomer v. Ross, 5 Taunt. 886; Rex v. Phillips, 1 Burr. 801 (*semble*); Wordsworth v. Brown, 8 Dowl. 698; Page v. Walker, 1 Tyl. 145 (*semble*), accord. — ED.

<sup>1</sup> Crosse v. Bilson, 6 Mod. 102; Lumley v. Hutton, 1 Rol. R. 271; Holcome v. Rawlins, Moore, 461; Tasker v. Salter, Moore, 867; Climson v. Pool, Latch. 148; Anon., Sav. 89, accord; Grills v. Ridgeway, Cro. El. 818; Dobson v. Douglas, 3 Lev 20; Stephens v. Cooper, 8 Lev. 441, *contra*. See Zouch v. Bamfield, 1 And. 167. — ED.

dict for the plaintiff. And *Darnell*, Sergt., moved for a repleader, because this was an immaterial issue.<sup>1</sup>

And judgment was given for the plaintiff, unless cause should be shown to the contrary the first day of this Hilary term. At which day *Darnell* argued, as he had argued before, that this was an immaterial issue, and that upon a repleader they ought to begin where the first fault is made, and that is where the immaterial issue is tendered, and not where it is taken. 21 Hen. VI. 14; 7 Hen. VII. 3; 22 Hen. VI. 19; Long 5 Ed. IV. 108; Bro. Repleader, 18, 21, 31, 35.<sup>2</sup> And he said that the difference is, that if the verdict passes against him who made the first fault in pleading, there no repleader shall be granted; but it is otherwise if it passes for him; which distinction is warranted by 15 Hen. VII. 4; Bro. Repleader, 23, 24; 24 Hen. VI. 57; Hob. 112; Tasker v. Salter. Now in this case the plaintiff made the first fault in pleading, and the verdict passed for him, and therefore a repleader is grantable. And the reason why it was denied in the case of Colwell and Milnes, might be because the plaintiff perhaps prayed it himself, because he did not think the damages good that were given by him; but here the defendant prays it. But it was adjudged by the whole court that no repleader should be awarded. For it is not totally an immaterial issue; for perhaps the defendant chased the cattle upon the land liable to his distress, and then levancy and couchancy is material; and the court will intend that it was so after a verdict. And therefore judgment was given for the plaintiff.<sup>3</sup>

*mit.*

# WITTS v. POLEHAMPTON.

IN THE KING'S BENCH, MICHAELMAS TERM, 1698.

[Reported in 8 Salkeld, 805.]

PER Holt, C. J. Where the plea of the defendant confesses the duty for which the plaintiff declared, but doth not sufficiently avoid it, and thereupon issue is joined on an immaterial thing, if it is found for the plaintiff, he shall have judgment, though the issue was immaterial; but where the defendant's plea avoids the plaintiff's duty, who replies and traverses a matter not material, and issue is taken upon such immaterial traverse, and it is found for him, the statute of jeofails will not help in such case; but there must be a repleader.

<sup>1</sup> Only so much of the case is given as relates to the question of repleader. — Ed.

<sup>2</sup> Symmers v. Regen, Cowp. 510, accord. — Ed.

<sup>3</sup> See Webb v. Bannister, Doug. 896; Taylor v. Whitehead, Doug. 747; Cleare v. Stevens, 8 Taunt. 418. — Ed.

Good declaration.

Good plea in C. & A.

Immaterial traverse

Ver. for pl'tf.

Little Gordon v. Ellis.

Court will grant replader.

Good declaration.

Conf. but no A.

Immaterial traverse.

Verd. for pl'tf.

Judgment will be given on Ver.



*mit.*

## STAPLE v. HEYDON.

IN THE QUEEN'S BENCH, TRINITY TERM, 1703.

[Reported in 6 Modern Reports, 1.]

THE plaintiff, Staple, brings trespass against John Heydon and George Fowler, for that they, on the thirty-first day of May, in the thirteenth year of the late King William, broke his close, called "the wharf," in Stepney, in Middlesex, and threw down a perch of rails therein standing; and also, for that, on the seventh day of July following, they entered into the same wharf, and committed the like trespass.

The defendant, George Fowler, as to all, pleads not guilty.

But John Heydon, as to the trespass laid on the thirty-first of May, pleads not guilty as to the force, and justifies the entry, and throwing down the rails, for that long before one Edward Gray was possessed by virtue of a certain lease for eighty years, then to come, and yet unexpired, of the said wharf, and also of a yard next adjoining thereunto; and that, for the necessary use of the said yard, he had and used a way over the said wharf to certain stairs on the river Thames, which was thereunto contiguous, there to take water, &c.; and that being so possessed, he, on such a day and year, which was prior to the time laid in the trespass, demised the said yard, *inter alia*, to the defendant, John Heydon, for a term of years yet unexpired, with all lawful ways, &c., thereunto belonging; by virtue whereof he entered, and was possessed, &c., whereby he was entitled to the said way; that the plaintiff obstructed it with rails, so that he, coming to use it, could not pass; and that he requested the plaintiff to open the rails, which he refused; so he justified the throwing them down. He pleaded directly in the same manner to the other trespass laid on the seventh of July; and avers that, at the several times, he had no other way to the said stairs and river Thames than by and through the said wharf.

The plaintiff, as to the plea to the first trespass, replies, that the defendant, John Heydon, had another convenient way to the river Thames than through the said wharf, and thereupon they were at issue; and upon the plea to the trespass on the seventh of July he demurs; "therefore let a jury come to try the issues, and assess contingent damages upon the demurrer."

Both defendants made default at *nisi prius*; which, being recorded, the inquest is awarded by default, and G. Fowler is found guilty of the trespass on the thirty-first of May, but acquitted of that on the seventh of July; and John Heydon is acquitted of the trespass on the thirty-first of May, as to the force, but the jury found, as to the

rest, that he had no other way to the said stairs and river Thames than through the said wharf; and assess damages upon the demurrer, and acquit him of the trespass on the seventh of July.

In this case several points were moved and resolved by the court.

The first question was, whether a repleader should be in this case, there being, as was said, an immaterial issue joined. And the court held clearly the issue was impertinent.

But as to repleaders in general, the court held, —

First, That a repleader is to be awarded when such an issue is joined, as the court after trial thereof cannot give a judgment, as being impertinent or uncertain, and not determining the right.

Secondly, That before the statute of jeofails, if such an issue were joined, the court before trial might award a repleader.

Thirdly, When a repleader is awarded, the amendment must begin where the plea, which makes the issue bad, begins to be faulty; and therefore if one make himself a bad title to his declaration, to which there is a bad bar, and thereupon a bad replication, on which there is issue, there the repleader must be awarded and entered on record; and the plaintiff shall declare *de novo*, &c. But if the bar be good, or the plea be good, and the replication bad, and issue thereupon, there a repleader will be only as to replication; but if bar and replication be both bad, and a repleader is awarded, it must be as to both.

Fourthly, If the court award a repleader where it ought not to have been, or deny it when it ought to be, it is error.

Fifthly, That upon the award of a repleader, there must be no costs, because it is a judgment of the court upon the pleading; but upon amendment of a plea in paper, there must be costs.

Sixthly, That upon a general rule for repleader, without any direction from the court from what they should begin the repleader, it must begin from the first fault which occasioned the bad pleading commenced; for the judgment is, *quod partes replacitent*.

Seventhly, That the pleadings in this case were such as a repleader would be awarded upon at the common law; for the defendant having insisted upon a title to a way by grant, his averment that he had no other way was immaterial, and by consequence the issue thereupon impertinent; besides, there was no issue at all joined, for the plaintiff's affirmative does not meet with the defendant's negative.

Eighthly, That though a repleader should have been at common law in this case, this motion having been made before trial, and it being doubtful whether a verdict would not help it by the statute of jeofails, the court said it would be just in them not to grant a repleader till after verdict; for they said they might indeed grant a repleader before verdict at common law, but they were not bound to do it.

Del. Good plea in Ct. v. General. Thomas.  
J. J. W.



Information in nature of your warrants  
for assuming office of Mayor of B.

Plea: That by 1st charter mayor was  
to hold on until successor elected,  
that 2nd charter made no stipula-  
tion & so he was holding on under  
right under 1st charter. That there  
was a usage to this effect.

Replication: No such usage.

Verdict: For King.

Motion in arrest of J.

Held: For King.

Reasons: The plea is bad in substance  
but it confesses the holding on  
& so no need of repleader.

Count seems to go on ground of  
express confession.

So note the diversity since the statute; for though it were reasonable to award a repleader before verdict at common law, where the pleading appeared such on which no judgment could be after verdict; yet since the statute, when a verdict may cure immaterial or informal issues, it may not be proper to do it.

Ninthly, After the trial the court held that this issue was such on which no judgment could be; for the defendant pleaded that he had no other way to the stairs and river Thames; the plaintiff replies that he had another way to the Thames; and the jury found no other way to the said stairs and river Thames; so in truth there was no issue joined.

Tenthly, That in this case there could be no repleader, for the parties were quite out of court by the default.

*omit.*

REX v. PHILIPS.

IN THE KING'S BENCH, HILARY TERM, 1720.

[Reported in 1 Strange, 894.]

INFORMATION *in natura de quo warranto* for usurping the office of mayor of Bodmyn.

The defendant by his plea makes title under two charters, one 11th of March, 5 Eliz., whereby the inhabitants were incorporated by the name of mayor and burgesses, and after appointing who shall be the first members of the corporation, it goes on and provides for the election of others on their deaths; and as to the mayor it is provided, that on Michaelmas day in every year the mayor, burgesses, and common council, or the major part of them, shall assemble and nominate two capital burgesses, out of whom the inhabitants are to choose one to be mayor, who, being so chosen, should take an oath to execute the office of mayor for the next year and till another should be chosen.

The other charter was 30th April, 36 Eliz., wherein the queen reciting the former manner and time of election, and the continuance in the office under such election, and reciting further that the corporation had petitioned her, *quatenus* she would alter *modum et tempus eligendi* of the mayor; therefore she, confirming all their former rights and privileges, appoints the election to be for the future by the mayor, common council, and town clerk, on the 24th of September *pro uno anno integro tunc proxime sequen'*. And then he avers, that as well before as since the second charter, the usage has been, for the mayor to hold over till another was chosen, and that he, being elected mayor.

served for a year, and the town clerk being then dead, and no new one chosen, there could be no new election of a mayor; *et eo warrant* he claims to hold the office of mayor till another shall be elected and sworn, and traverses the usurpation.

The attorney for the crown praysoyer of the last charter, which being set out, there appears a further clause, whereby the queen abolishes all the former manner *eligendi, nominandi et appunctuandi* of the mayor; and then takes issue, that since the charter of 36 Eliz, there has been no such usage of holding over; which goes down to trial, and is found for the king.

It was now moved in arrest of judgment, that this was an immaterial issue, because it not being a corporation by prescription, the title to the office must depend upon the charter, and not upon any usage within time of memory; and that this is worse than most cases of immaterial issues, for they are often good if found one way, and bad the other; as *solvit ante diem* is good if found for the defendant. But here the finding for the king can neither destroy, nor could a verdict for the defendant have established, his right, because his right does not depend on any usage inconsistent with the charter, but must stand or fall by the charter itself.

And without much argument the court was clear in opinion, that this was an issue totally immaterial. But then the question arose, what the court should do in this case, — whether they were to award a repleader, or, laying the replication out of the case, proceed to give judgment on the defendant's plea.

And for a repleader it was argued by *Mr. Solicitor General*, that the court could not give judgment on the plea, for every judgment must be either, 1. On an issue in fact, found by verdict; 2. Issue in law, on demurrer; 3. *Nil dicit*; or, 4. Confession. 1. As to the first, it is admitted there is no good issue in fact, and consequently no good verdict to found the judgment upon. 2. Here is no issue in law, for want of a demurrer. 3. It cannot be by *nil dicit*, for the defendant has pleaded. 4. The only question is, whether this plea can be taken to be a confession of the usurpation; and I take it, it cannot, for though an usurpation is charged, yet it is so far from being confessed, that he expressly denies it in his traverse; and relies upon it that he has a good right; he admits the user, but not the usurpation; the charge upon him is, that he has exercised this office without lawful authority; it is true, says he, I have exercised this office, but I insist that I had a good authority so to do; and now will anybody say, this is a confession of the usurpation?

But then it is objected, that if the title set out is ill in point of law, then the admission of the user is a tacit admission of the usurpation.





To this I answer: 1. That the title is good in law under the two charters, taking them together. By the first charter the mayor being elected by the inhabitants on Michaelmas-day is to hold for a year and till another is chosen. The second charter, which was made to alter the *tempus et modum eligendi* only, says he shall be chosen by a select number, and upon 24th September. But it does not meddle with the right of holding over; on the contrary, it expressly confirms all their former rights and privileges, of which this of holding over was one. And it will be hard to say, that an alteration in the manner of electing only, shall take away the former right which the officer when elected had in the office, especially in a point which tends so much to the preservation of the body corporate.

2. But if the plea should be ill in point of law, yet the court cannot give judgment that it is so, till it comes properly before them. If they may, then whenever a vicious plea is put in, the court may, without the party's answer or demurrer, give judgment upon it immediately; and that will be the case here, for now the replication is out of the case, and we stand before the court only upon the information and the plea. In Lev. 32, *Serjeant v. Fairfax*, the issue was held immaterial, and the defendant's plea a naughty plea, but yet the court did not give judgment upon it, but awarded a repleader.

*Pengelly, Serjt., contra.* The defendant in his plea has made no good title to this office, for the second charter is what he must stand or fall by, and in that there is no provision for holding over.

But, say they, in the first charter there is, and that continues in force as to every thing in which it is not altered by the subsequent charter.

The force of this depends upon that question, whether the second charter is not the entire rule to go by as to the office of mayor. And that it is, is plain from the clause which abolishes all the former method of election; and if the former method of election be abolished, surely an incidental right under such election will be gone also. The right of election is transferred to other persons; and can there be a duration under an election, when the foundation of that holding over is gone? *Pro uno anno integro* is the same as if *tantum* had been added, and the acceptance of the charter is general, without any reservation of the former right of holding over. 1 Ven. 297; 2 Mod. 95.

And as the plea is ill, we take it judgment may be given upon it, for he has confessed the user; and as to the traverse of the usurpation, that is so immaterial, that in *Sir Peter Delme's Case*, and the case of *Honiton*, it was held, the crown could not take issue upon such a traverse. Whoever admits a user, confesses at the same time that he is guilty of an usurpation, unless he makes a title to the franchise; as in the common case of a justification in trespass or for words, where it

amounts to no justification in law, judgment may be given upon the confession. 2 Roll. Abr. 98, pl. 2, 99, pl. 1, 3; Cro. Eliz. 228, 214; 22 Ed. IV. 46 *b*; Salk. 173.

*Mr. Solicitor General* replied. The corporation could not do any otherwise than accept the charter in general, for it cannot be accepted in part, or with qualifications. I agree *tantum* is implied in charters of original creation, but not in charters of confirmation.

**CHIEF JUSTICE.** We are moved on behalf of the defendant, that we will grant a repleader; that is, in other words, that we should give this cause a further delay, whilst he is holding over all the while. Now consider, that if we should grant it, the defendant cannot mend his case; for the plea will stand, and, after the formality of a demurrer, we must give judgment upon the goodness or badness of the plea. The attorney for the crown does not pray a repleader, neither would the granting one do him any good, for we cannot better his case, but must rest it upon the demurrer. And therefore, as it will answer no good purpose either way, we certainly will not grant a repleader, if there be a more expeditious way of coming to the end of the cause; and I think there is; for if the plea be ill, I am of opinion it amounts to a confession of the usurpation, and that is warrant enough to ground our judgment upon.

Now the validity of the defendant's title, as he makes it in his plea, depends upon the question, whether the right of holding over subsists under the second charter. And I hold it does not, for it is very observable, that the second charter where it recites the former, takes express notice of the clause for holding over; and then when it comes and abolishes all the former method of election, and appoints it to be in another manner, and that the mayor shall continue in for a year, it cannot be imagined but that this right of holding over was intended to be abolished also. Suppose the second charter had said, that the mayor shall continue in for three quarters of a year; will anybody say, that the reservation of their former privileges should entitle him to hold on for the other quarter under the old charter; I believe nobody will think so; I think this is not to be distinguished from the case of an ill justification in trespass; and therefore, as the plea is ill, and contains no title to the franchise, I am of opinion, we may give judgment upon it, as confessing an usurpation.

**POWYS, J.** I am of the same opinion; for if we should grant a repleader, I do not see how we can have any new light in the cause.

**EYRE, J.** If the defendant's plea had confessed the usurpation, I should think it proper enough to give judgment upon the plea; but I do not think any more is confessed by it than the user. The second charter, it is plain, was made only for particular purposes in relation to







the election, but meddles not with the duration in the office; and therefore I can never agree, that any affirmative words in the charter can take away so great a privilege as that of holding over is, and a privilege, too, that may often serve to prevent the extinction of the corporation; especially when it provides that all the former rights of the corporation, not altered by the subsequent charter, shall still continue. And as to the clause of abolition, that is expressly confined to the authority, form and manner *eligendi*, but not a word of any right *tenendi*.

I think he is not a new mayor absolutely, but as to the right of holding over, it subsists in him under the former charter; the consequence of which is, that he has confessed no usurpation, and then no judgment can be given against him upon the plea.

FORRESCUE, J. The defendant cannot mend his case, because the plea is good in form, though not in fact, which is a distinction always taken into the doctrine of repleaders; and of this opinion was Holt, C. J., in the case of *Jones v. Bodinner*,<sup>1</sup> where he said, that if the fact be admitted, there shall be no repleader, but a judgment upon the confession.

Here the defendant admits the user, and then the usurpation is a consequence of law, and that is the reason why it is not traversable. Every justification, to make it a perfect one, must both confess and avoid; and where it does not do the latter, the confession stands.

As to the merits of the plea, I think the power of holding over is gone upon the second charter; for the *modus eligendi* takes in all the circumstances of the election, and the duration in the office is one of those.

Besides, as the day of election is altered, there can be now no holding over under the old charter, for that only empowers him to do it from Michaelmas-day; but, then, what right has he to hold over from the 24th of September till that time? I am of opinion that judgment may be given immediately.

*Per curiam.* Judgment for the king. And the corporation petitioned for a new charter.

<sup>1</sup> Salk. 1.



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